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BENCHBOOK

By

The
Kansas Judicial Council
Benchbook Advisory Committee

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KANSAS SUPREME COURT

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1984 Kansas Benchbook Supplement

The enclosed pages comprise the 1984 supplement to the Kansas Benchbook. The Benchbook was published and distributed in September of 1978. This is the fifth supplement to the book and contains changes in several chapters.

Users of the Kansas Benchbook should be grateful to the Judicial Council Benchbook Advisory Committee Members for their work in preparing this supplement.

James J. Noone, Chairman
Kansas Judicial Council
Benchbook Advisory Committee

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1983 Kansas Benchbook Supplement

The following pages comprise the 1983 supplement to the Kansas Benchbook. The Benchbook was published and distributed in September of 1978. This is the fourth supplement to the book and contains changes in several chapters, and new chapters on Driving While Intoxicated and Interest on Judgments. The Judicial Council will publish a supplement to the book on a yearly basis if there is sufficient change to warrant a supplement, or if drafting a new chapter is deemed to be desirable.

In the attached supplement the numbered pages replace pages of the same number that are now in the book. Instructions regarding the replacement of pages in the binder are printed on the inside cover of the binder.

Users of the Kansas Benchbook should be grateful to the Judicial Council Benchbook Advisory Committee Members for their work in preparing this supplement.

The Benchbook Committee wishes to acknowledge with gratitude the many contributions made over the years by the late Charles E. Henshall.

James J. Noone, Chairman
Kansas Judicial Council
Benchbook Advisory Committee

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1982 Kansas Benchbook Supplement

The following pages comprise the 1982 supplement to the Kansas Benchbook. The Benchbook was published and distributed in September of 1978. This is the third supplement to the book and contains changes in several chapters. The Judicial Council will publish a supplement to the Benchbook on a yearly basis if there is sufficient change to warrant a supplement, or if drafting a new chapter is deemed to be desirable.

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James J. Noone, Chairman
Kansas Judicial Council
Benchbook Advisory Committee

1981 Kansas Benchbook Supplement

The following pages comprise the 1981 supplement to the Kansas Benchbook. The Benchbook was published and distributed in September of 1978. The first supplement to the book was published and distributed in May of 1980. The following is the second supplement to the book and contains changes in several chapters. It is the plan of the Judicial Council to publish a supplement to the Benchbook on approximately a yearly basis if there is sufficient change to warrant a supplement or if drafting a new chapter is deemed to be desirable.

In the supplement the numbered pages replace pages of the same number that are now in the book. Instructions regarding the replacement of pages in the binder are printed on the inside cover of the binder.

Users of the Kansas Benchbook should be grateful to Judge John W. Brookens, and practicing attorneys Charles E. Henshall; Byron G. Larson and Donald Patterson for their work in preparing this supplement.

Judge James J. Noone, Chairman,
Kansas Judicial Council
Benchbook Advisory Committee

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1980 Benchbook Supplement

The following pages comprise the 1980 supplement to the Kansas Benchbook. The Kansas Benchbook was published and distributed in September of 1978. The following is the first supplement to the book and contains changes in several chapters and a short new chapter relating to adoption. It is the plan of the Judicia Council to publish a supplement to the Kansas Benchbook on approximately a yearly basis if there is sufficient change in the published chapters to warrant a supplement or if a new chapter is deemed to be desirable.

In the supplement the numbered pages replace pages of the same number that are now in the book. Pages that are numbered and have a letter following the number (i.e. 124a) follow the page with the same number but no letter. Instructions regarding the replacement of pages in the binder are printed on the inside cover o the binder.

Users of the Kansas Benchbook should be grateful to Judges John W. Brookens and Harold R. Riggs, and practicing attorneys Charles E. Henshall; Byron G. Larson; Donald Patterson, an Gene H. Sharp for their work in preparing this supplement.

James J. Noone

Honorable James J. Noone,
Chairman, Judicial Council
Benchbook Advisory Committee

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F O R E W O R D

Publication of the Kansas Benchbook for trial judges of the state's Unified Judicial Department was made possible by the work of a committee of district judges and lawyers, and by a federal grant to the Judicial Council.

The committee was an advisory committee of the Judicial Council and was chaired by Judge James J. Noone, a member of the Council. It was the purpose of the committee to produce a ready reference work that would assist in answering questions a trial judge typically encounters.

The Governor's Committee on Criminal Administration defrayed the major portion of the cost of this project by making the federal grant available to the Council. The grant itself was awarded under the provisions of Title I of the federal Omnibus Crime Control and Safe Streets Act of 1968 as amended by the Crime Control Act of 1973.

The Judicial Council expresses its appreciation and gratitude to the Governor's Committee on Criminal Administration for its generosity, and to the members of the committee for their enthusiastic and diligent work and the free time sacrificed in preparing the Benchbook.

Alfred G. Schroeder, Chairman
The Judicial Council of Kansas

P R E F A C E

The Benchbook Advisory Committee of the Kansas Judicial Council held its first meeting on September 27, 1974, and continued to meet monthly, with a few exceptions, through July 28, 1978. Most of the members of the committee had no familiarity with benchbooks so several of the earlier meetings were devoted to a study of benchbooks used in other states and in the federal courts. As a result, a decision was made to divide the text into seven major chapters: Civil-Before Trial; Civil-Trial; Civil-After Trial; Criminal-Before Trial; Criminal-Trial; Criminal-After Trial; and Miscellaneous. The impact of court unification, adoption of the uniform district court rules, and passage of new legislation sent us back to the "drawing board" more than once, and we had to reeducate ourselves repeatedly.

The Kansas Benchbook does not attempt to cover the entire spectrum of the law, and specialized areas of the law, such as probate, are not treated. It is, however, an open-end book, and additional chapters may be added at some future time if warranted. Its purpose is to serve as a quick reference work primarily for the Kansas judiciary and secondarily for the trial bar. It is hoped that it will provide some ready answers to questions that crop up daily, or furnish direction to potential sources of answers. It is intended as an aid to, rather than a substitute for, research.

I express my personal thanks to District Judges John W. Brookens of Westmoreland, Harold R. Riggs of Olathe, and Robert F. Stadler of Iola, and to attorneys Donald Patterson of Topeka, Charles E. Henshall of Chanute, Gene H. Sharp of Liberal, and Byron G. Larson of Dodge City for the untold hours and days they dedicated to research, drafting, presenting, redrafting and editing this work. I express my gratitude also to attorneys Charles S. Fisher, Jr. of Topeka and Jack E. Dalton of Dodge City who made valuable contributions to the preparation of materials during the earlier part of the committee's work. The committee is also indebted to Randy Hearrell and Paul Purcell of the Judicial Council staff who rendered invaluable service as reporter and editor, respectively, and to Nell Ann Gaunt of the Council staff for her clerical and administrative services.

James J. Noone, Chairman
Benchbook Advisory Committee

July 28, 1978

CIVIL - BEFORE TRIAL

(K.S.A. Chapter 60)

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CIVIL - BEFORE TRIAL

(K.S.A. Chapter 60)

I. COMMENCEMENT OF ACTION

An action is commenced as of the time the petition is filed if service of process is obtained or the first publication is made within 90 days thereafter; otherwise, the action is not deemed commenced until the time of service of process or first publication. K.S.A. 60-203. Commencement of the action tolls the running of the statute of limitations.

II. DOCKET CALL

A court may hold a call of pending cases to determine case status and to set matters or cases for hearing, pre-trial, or trial. The call may be scheduled for a time determined by the court. If a court schedules a call, seven days notice of the call must be given to counsel of record or to pro se parties. If counsel of record or the pro se party will not be appearing personally at the docket call, he or she should advise the court, prior to the date of the call, of the status of the case. This notice should be in writing and should include (1) any requests for the scheduling of hearings, pre-trials, or trials, and (2) an estimate of the amount of time any such trial will take. S. Ct. Rule 104.

III. EX PARTE MATTERS

A. GENERAL POLICY

No motion, hearing or other application to the court for affirmative relief against a person should be heard ex parte unless expressly permitted by statute or supreme court rule. Counsel must be present personally to present ex parte applications, unless excused by the judge. S. Ct. Rule 132.

NOTE: If the matter is not an ex parte matter, the notice requirements of S. Ct. Rule 131 apply as do the computation methods prescribed by K.S.A. 60-206(a) and (e). See also Wheat State Telephone Company v. State Corporation Commission, 195 Kan. 268; Barnes v. Gideon, 224 Kan. 6.

B. COMMON EX PARTE ORDERS

1. Replevin and Security Interests

Restraining orders may be issued ex parte and without bond in replevin cases and in actions to foreclose a security interest upon such terms and conditions as the court deems necessary to protect the property during the pendency of the action and to protect the court's jurisdiction over the property. Alternatively, an order for delivery of property may be issued ex parte but only in accordance with requirements imposed by K.S.A. 60-1005(b) or 60-1006(b).

2. Depositions for Foreign Jurisdictions

If a deposition is to be taken in this state pursuant to the laws of and for use in another jurisdiction, the court, upon the filing of a petition, may make an ex parte order directing issuance of a subpoena commanding the deponent to be present to give testimony at the time and place specified. K.S.A. 60-228.

3. Protection of Party, Party's Rights, or Judgment

An order may be issued ex parte under the conditions imposed by K.S.A. 60-902 and 60-903 to restrain during the ensuing litigation an act that would violate another party's rights regarding the subject of the action, or an act that could render ineffective a forthcoming judgment.

NOTE, however, that K.S.A. 60-904 specially governs ex parte restraining orders pertaining to labor disputes.

For related information see the Injunctive Relief section of the Miscellaneous chapter.

4. Temporary Support

Ex parte orders for temporary support are governed by S. Ct. Rule 139. See the Divorce; Annulment; and Separate Maintenance section of the Miscellaneous chapter.

IV. DEFAULT JUDGMENT

A. NOTICE

The law favors trial of causes on the merits and looks with disfavor upon default judgments. Accordingly, a default judgment may not be entered unless the defaulting party has notice of the claim against him or her. That the defaulting party has such notice may be shown by proving service of process in the manner prescribed by K.S.A. 60-312 or by proof that the defaulting party has entered an appearance - the legal equivalent under K.S.A. 60-203 of service of process. Appearance is an overt act by which a party comes into court and submits himself or herself to its jurisdiction. Sharp v. Sharp, 196 Kan. 38. It usually is effected when a party files a pleading, motion, or other instrument, or personally is present in court (but see S. Ct. Rule 115 for limitations on use of certain entries of appearance as the equivalent of service). If there has been an entry of appearance, K.S.A. 60-255(a) requires that the defaulting party or his or her representative must be given, at least 3 days prior to the hearing on the application for default judgment, a written notice that such application has been made. If the application for default judgment is in an action in which unliquidated damages are sought, S. Ct. Rule 118(d) applies and a default judgment may not be entered unless the claimant has given the defaulting party the required 10 days notice of the amount of the default judgment.

B. PROOF REQUIRED

Except in cases involving liquidated damages, the party obtaining default judgment has the burden of proving the amount of his or her damages or claim. An evidentiary hearing should be held. See K.S.A. 60-255(a).

C. ENTRY

The kind and amount of award by default are governed by K.S.A. 60-254(c); default judgments after service under the long arm statute are specifically addressed at K.S.A. 60-308(a)(3); default judgments against the state are covered by K.S.A. 60-255(d).

D. SETTING ASIDE

A court may set aside a default judgment for one of the reasons listed in K.S.A. 60-260(b). K.S.A. 60-255(b). See Montez v. Tonkawa Village Apartments, 215 Kan. 59, and Automatic Feeder Co. v. Tobey, 221 Kan. 17, for when a motion to set aside a default judgment may be granted, as well as for relevant procedure.

V. TEMPORARY INJUNCTION

A temporary injunction may be allowed as a provisional remedy. The manner in which it differs from a restraining order is described in the Injunctive Relief section of the Miscellaneous chapter. It cannot be issued after an ex parte hearing although it can continue a restraint imposed by an ex parte restraining order.

VI. EXTENSIONS OF TIME

A. PLEADING TO PETITION

The initial time to answer any petition may be extended once by the clerk of the court for a period not to exceed ten days. The order for any such extension must be served on all adverse parties in accordance with K.S.A. 60-205. All other extensions of time to plead shall be by order of the judge. S. Ct. Rule 113.

B. OTHER EXTENSIONS (K.S.A. 60-206(b))

Generally, extensions other than those discussed in paragraph VI. A. and requested before the expiration of the period originally prescribed are discretionary with the court. Where good cause is shown the request should be granted for a reasonable period. Extensions requested after the expiration of the period originally prescribed may be granted if the failure to act was the result of excusable neglect, a term defined in Boyce v. Boyce, 206 Kan. 53, 55-56.

NOTE: There are exceptions to these general statements. See K.S.A. 60-206(b).

VII. PRE-TRIAL CONFERENCE

Upon request of a party, the court is required to hold a pre-trial conference to consider any of the items set forth in K.S.A. 60-216. The court, in its discretion, may require a pre-trial conference even if there has been no request for it. A discovery conference

may precede a pre-trial conference and, if it does, is an initial pre-trial conference not governed by K.S.A. 60-216 or S. Ct. Rule 140. S. Ct. Rule 136 governs discovery conferences.

If the pre-trial conference authorized by K.S.A. 60-216 is to be held, it should be held after discovery has been completed and at least 2 weeks prior to trial. S. Ct. Rule 140. The court may establish a calendar for pre-trial conferences.

NOTE. S. Ct. Rule 140 applies to both jury and nonjury cases and the trial court should adhere strictly to its provisions.

S. Ct. Rule 170 should be referred to when a pre-trial conference results in the issuance of an order.

VIII. SUMMARY JUDGMENT

A. GENERAL POLICY

If the requirements of S. Ct. Rule 141 and K.S.A. 60-256 have been met, summary judgment should be granted in those cases where (1) there exists, after discovery has been completed, no genuine issue of any material fact and (2) the moving party is entitled to judgment as a matter of law. K.S.A. 60-256(c). "Genuine issue of material fact" means that there is an actual and good faith dispute about the facts that determine the controlling legal issue of the case. See Secrist v. Turley, 196 Kan. 572, Pedi Bares v. First National Bank, 223 Kan. 477, and the annotations to K.S.A. 60-256.

In determining whether a genuine issue of material fact exists, the court must give to the party against whom summary judgment is sought the benefit of all favorable inferences that may be drawn from the facts under consideration. If there is reasonable doubt as to the existence of a material fact summary judgment is improper. Similarly, surmise or belief on the part of a trial court that a party cannot prevail on trial is insufficient for granting summary judgment.

Motions under K.S.A. 60-212(b) and (c) can be treated as motions for summary judgment. Collateral estoppel may be presented in the form of a motion for summary judgment. See Goetz v. Board of Trustees, 203 Kan. 340.

B. ENTRY

The court must state the controlling facts, as required by K.S.A. 60-252, and the legal principles controlling the decision to grant the motion for summary judgment. S. Ct. Rule 165.

Summary judgment may be entered on the court's own motion but only if the same conditions exist as would justify a summary judgment on motion of a party. Green v. Kaesler - Allen Lumber Co., 197 Kan. 788. (Those conditions are described in paragraph VII. A.)

Orders made under K.S.A. 60-256(d) setting out the material facts that are without substantial controversy are not final orders even though frequently termed partial summary judgments. Such orders are summary interlocutory determinations subject to revision and modification.

In re Estate of Countryman, 203 Kan. 731. Partial judgments rendered on a motion for summary judgment are final only if entered under the requirements of the first sentence of K.S.A. 60-254(b).

IX. MINORS AND INCAPACITATED PERSONS

A. DEFINITIONS

"Guardian ad litem" is a person who has been appointed by the court to act during the course of a particular judicial proceeding on behalf of another person under a legal disability.

"Incapacitated person" is a person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic narcotic drug addiction, chronic intoxication, or some other cause to the extent that he or she lacks sufficient understanding or capacity to make or communicate responsible decisions concerning either his or her person or estate. K.S.A. 59-3002. An incapacitated person is under a legal disability.

"Minor" is every person under the age of 18 years except that those persons 16 years of age or older who are or have been married are of the age of majority in all matters relating to contracts, property rights, liabilities, and the capacity to sue and be sued. K.S.A. 38-101, as amended A minor is under a legal disability.

"Next friend" is a person, not appointed by the court, who brings and litigates an action on behalf of a minor or incapacitated person.

B. SERVICE OF PROCESS

Service of process on minors and incapacitated persons is accomplished in the manner required by K.S.A. 60-304(b) and (c). Failure to obtain service of process in the manner required will void any judgment subsequently rendered. Pierson v. Brenneman, 171 Kan. 11; Poorman v. Carlton, 122 Kan. 763.

C. PLAINTIFF UNDER DISABILITY

If a minor or incapacitated person already has a legal representative, the representative may sue on behalf of the minor or incapacitated person. If there is no such representative a suit may be brought for the minor or incapacitated person by a next friend or by a guardian ad litem. K.S.A. 60-217(c). A minor or incapacitated person may not sue without a representative who is not under legal disability.

If the suit brought by a next friend is not being conducted in the interest of the legally disabled plaintiff, the court may appoint a guardian ad litem for the plaintiff or permit another next friend to replace the original next friend. If the minor or incapacitated person has attempted to sue without a representative the judge, rather than dismissing the case, may appoint a guardian ad litem in order to proceed with the suit.

D. DEFENDANT UNDER DISABILITY

If a minor or incapacitated person already has a legal representative, the representative has a duty to defend the minor or

incapacitated person if suit has been brought against the minor or incapacitated person. If there is no representative or if the appointed representative fails to defend, the court in which the suit is pending must appoint a guardian ad litem to defend the minor or incapacitated person.

E. JUDGMENTS

Any judgment rendered in a case in which an unrepresented minor or incapacitated person was a defendant is voidable under K.S.A. 60-260(b)(6), but not void. See K.S.A. 60-255 (default judgments).

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V. EVIDENCE OF PRIOR CIVIL WRONGS OR CRIMES (K.S.A. 60-455)

I. SEQUENCE AND ORDER OF TRIAL; SPECIAL CONSIDERATIONS

A. THE ORDER OF TRIAL EVENTS

1. Rule on motions before trial.

2. Where jury trial is demanded or ordered, select jury.

3. Consider any request to exclude from the courtroom a witness scheduled to testify in the case. (Exclusion may occur any time prior to trial.)

4. Plaintiff's counsel makes opening statement.

5. Defendant's counsel makes opening statement.

6. Court may give preliminary statement or instructions to jury.

7. Presentation of evidence:

a. Plaintiff's counsel calls witness(es) for the plaintiff.

b. Cross-examination of plaintiff's witness(es) by defendant's counsel.

c. Plaintiff rests its case in chief. Rule on appropriate motions at the close of plaintiff's evidence.

d. Defendant's counsel calls witness(es) for the defense.

e. Cross-examination of defendant's witness(es) by plaintiff's counsel.

f. Defendant, or defendants in multi-party litigation, rest case in chief.

g. Plaintiff's counsel calls reply and rebuttal witness(es).

h. Defendant's counsel calls reply and rebuttal witness(es).

i. View of premises where germane to the issues. (May be accomplished at any stage of trial.)

j. Plaintiff's counsel rests its entire case.

k. Defendant's counsel rests its entire case.

l. Rule on appropriate motions.

8. Consider and rule on requests for and objections to instructions to the jury.

9. Provide counsel for each party with a copy of court's instructions.

10. Charge the jury.

11. Plaintiff's counsel makes first part of closing argument.

12. Defendant's counsel makes closing argument.

13. Plaintiff's counsel makes balance of closing argument.

14. Place bailiff under oath to attend to the jury.

15. Instruct the jury to go to the jury room and commence deliberation.

16. Excuse alternate juror. If the alternate juror may be needed because of possible disability of one of the regular jurors, place alternate juror in custody of sheriff during deliberation.

17. Recess court during the deliberations.

18. Answer any questions submitted by the jury and give any appropriate additional instructions.

19. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations provide for their overnight sequestration or permit the jurors to separate temporarily at night; admonish the jurors as to their conduct; fix the time to reconvene court and for the jury to return and resume deliberations.

20. When the jury has agreed on a verdict, reconvene court and take the verdict. If the jury cannot agree, declare a mistrial.

21. Poll the jury upon demand of either party.

22. Discharge all jurors.

23. Entertain appropriate motions and enter judgment.

24. Adjourn or recess court.

B. SPECIAL CONSIDERATIONS BEFORE OR AFTER COMMENCEMENT OF PRESENTATION OF EVIDENCE

1. Motions in Limine

The pre-trial conference should eliminate the need for motions in limine to determine what matters are immaterial or prejudicial. If such a motion is timely the court, after taking into account any order entered or agreement reached at a pre-trial conference (K.S.A. 60-216), may rule before trial on the admissibility of evidence or on matters relating to the conduct of the trial.

2. Selecting the Jury

a. Voir Dire - General Policy

The extent of examination of jurors on voir dire is within the trial court's discretion. Unless abuse is clear, a reviewing court will not interfere. State v. Guffey, 205 Kan. 9, 13; Mathena v. Burchett, 189 Kan. 350, 355.

The trial judge has an obligation to see that a fair and impartial jury is selected but the parties or their attorneys are to conduct the examination. K.S.A. 60-247(b). Considerable latitude should be allowed so that prospective jurors who have any bias or prejudice or are otherwise unqualified will be excluded.

Questions about extraneous matters of a prejudicial character that may improperly influence the verdict, however, may not be permitted. (But see S. Ct. Rule 118 (b).) If reasonable restraints placed upon counsel by the trial court are not heeded and opposing counsel is required repeatedly to object, the court may select the jury panel without the aid of counsel for either party. Bartlett v. Heersche, 204 Kan. 392.

b. Voir Dire - Challenges

1) Challenges for cause

Whether a prospective juror must be excused for cause is within the trial judge's discretion. Rauscher v. St. Benedict's College, 212 Kan. 20; K.S.A. 60-247(c). If the trial judge is in doubt as to the impartiality of a juror, the juror should be excused. Missouri K. & T. Ry. Co. v. Munkers, 11 Kan. 223.

Reference should be made to K.S.A. 43-156, 43-158, 43-159, 43-160, and 60-247(a).

Consideration should be given to permitting challenges for cause to be exercised in a manner that will keep prospective jurors from knowing which side has challenged a prospective juror.

2) Peremptory Challenges

Each party (or parties united in interest) is entitled to 3 peremptory challenges and if alternate jurors are to be selected each party is entitled to 1 peremptory challenge to the panel of alternate jurors. Peremptory challenges for multiple plaintiffs or defendants are governed by K.S.A. 60-247(c). Peremptory challenges must be exercised in a manner which will not communicate to the challenged prospective juror the identity of the challenging party or attorney.

3. Opening Statements by Counsel

The purpose of the opening statements is to inform the jury of the general nature of the claim or defense, the issues, and the facts intended to be proved. Objections to any part of the opening statements are subject to K.S.A. 60-404, the contemporaneous objection rule. If not timely interposed, such objections are deemed waived.

4. Optional Preliminary Instructions by the Judge

After the opening statements the judge may give any instructions to the jurors that will assist them in considering the evidence to be presented. K.S.A. 60-251(a)

5. Order of Proof

a. The party having the burden of proof is entitled to open and close presentation of evidence and arguments. See K.S.A. 60-401(d); S. Ct. Rule 168; Railroad Co. v. Johnson, 74 Kan. 83; Schmidt v. Farmers Elevator Mutual Ins. Co., 208 Kan. 308..

b. The order of proof is usually as follows:

1) Counsel for plaintiff conducts direct examination of its witness(es) and counsel for defendant cross-examines. Then plaintiff rests its case in chief.

2) Counsel for defendant conducts direct examination of its witness(es) and counsel for plaintiff cross-examines. Then defendant rests its case in chief.

3) Plaintiff calls rebuttal witness(es), presents rebuttal evidence as permitted by the court, and rests.

4) Defendant calls surrebuttal witness(es), presents evidence as permitted by the court, and rests.

c. Rebuttal and Surrebuttal - General Rule

Either party is entitled to rebut the evidence of the other party by competent evidence that explains, contradicts, or disproves such other evidence. Rebuttal testimony is usually admissible only when new matter has been developed by the evidence of one of the parties and is limited to a reply to new points.

6. Conforming Pleadings to Evidence

In order to conform the pleadings to the evidence presented, they may be amended in accordance with K.S.A. 60-215(b).

7. Reopening the Case in Chief

Whether a side's case in chief may be reopened to introduce additional evidence is discretionary with the court. In re Estate of Cox, 184 Kan. 450; City of Wichita v. Unified School District No. 259, 201 Kan. 110, 118.

II. WITNESSES

A. EXCLUSION FROM THE COURTROOM

The court, in its discretion, may exclude a witness from the courtroom whenever the witness is not testifying. West v. West, 135 Kan. 223.

B. COMPETENCY

Unless otherwise provided by statute, every person is qualified to be a witness. K.S.A. 60-407. A prospective witness

may be disqualified if he or she lacks the capacity to express himself or herself so as to be understood, or if the witness is incapable of understanding the duty to tell the truth. K.S.A. 60-417. A witness is presumed competent and the burden of establishing incompetence is on the challenger. State v. Poulos, 196 Kan. 253, 263.

C. INTERPRETERS

The court must appoint an interpreter for a witness who is deaf or mute, or whose primary language is other than English. See K.S.A. 60-243(e).

D. AS A RELIABLE SOURCE OF KNOWLEDGE

The qualifications of a witness to testify on a particular subject are determined by the trial court. Avery v. St. Francis Hospital, 201 Kan. 687. A witness, other than an expert witness, may testify only as to relevant matters within his or her personal knowledge and may give testimony in the form of opinions if the judge finds that the opinions may be rationally based on the perception of the witness and are helpful to a clearer understanding of his or her testimony. See K.S.A. 60-419.

E. PRIVILEGES THAT MAY PREVENT THE INTRODUCTION OF TESTIMONY

1. General Considerations

If a privilege is claimed neither the judge nor the attorneys may comment on the claiming of the privilege, no presumptions arise, and no adverse inferences may be drawn. Only a party who

holds a privilege has the right to appeal an adverse ruling regarding the privilege. K.S.A. 60-440. Certain conduct may preclude the claiming of a privilege. See K.S.A. 60-437.

2. Statutory Privileges

a. Lawyer-Client (K.S.A. 60-426)

"Lawyer," "client," and "communication" are defined at K.S.A. 60-426(c). See also the annotations to this statute.

Communications between a lawyer and a client in the course of that relationship and in professional confidence are privileged. A client has a privilege to refuse to disclose and to prevent his or her lawyer from disclosing any such communication. A client also has a privilege to prevent any other person from disclosing such communication if it came to the knowledge of such person (1) in the course of its transmittal between the client and the lawyer, or (2) in a manner not reasonably to be anticipated by the client, or (3) as a result of a breach of the lawyer-client relationship. The privilege may be claimed by the client in person or by a lawyer on behalf of a client.

The lawyer-client privilege does not extend to a communication:

1) if legal services were sought to enable the commission of a crime or a tort;

2) relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction;

3) relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer;

4) relevant to an issue concerning an attested document of which the lawyer is an attesting witness;

5) between two or more clients if made by any of them to a lawyer retained in common when offered in an action between any such client.

Where a client chooses to make or receive communications from his attorney in the presence and hearing of third persons they cease to be confidential and are not privileged. Fisher v. Mr. Harold's Hair Lab, Inc., 215 Kan. 515.

See the Kansas work product rule embodied in K.S.A. 60-226(b). See also Alseike v. Miller, 196 Kan. 547. Both relate to discovery from a deponent of writings prepared by or under the supervision of an attorney in preparation for trial.

b. Physician - Patient (K.S.A. 60-427)

"Physician," "patient," "confidential communications between physician and patient," and "holder of the privilege" are defined at K.S.A. 60-427(a).

In a civil action, confidential communications between physician and patient reasonably believed by either to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment for the condition are privileged. The person who is or had been the patient at the time of the communication, his or her guardian or conservator or, if the patient is deceased, the patient's personal representative has a privilege, if claimed, to refuse to disclose and to prevent the physician from disclosing any such communications. Others who may be prevented from disclosing such communications are witnesses (1) to whom disclosure was made at the time of the communication because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (2) who obtained knowledge or possession of the communication as the result of an intentional breach, by the physician or the physician's agent or servant, of the physician's duty of nondisclosure. See K.S.A. 60-427(b).

The physician-patient privilege does not exist in those situations described at K.S.A. 60-427(c), (d), (e), or (f).
See State v. George, 223 Kan. 507.

The physician-patient privilege may be lost. See K.S.A. 60-427(g).

c. Marital Privilege (K.S.A. 60-428)

A spouse, whether or not a party to the action, has a privilege during the marital relationship to refuse to disclose and to prevent his or her spouse from disclosing communications made in confidence to his or her spouse while married.

The spouse to whom the communication was made may claim the privilege.

No such privilege exists under the circumstances enumerated at K.S.A. 60-428(b).

The marital privilege may be lost. See K.S.A. 60-428(c).

d. Penitential Communication Privilege (K.S.A. 60-429)

"Penitential communication," "penitent," and "regular or duly ordained minister of religion," are defined at K.S.A. 60-429(a).

A person, whether or not a party, has a privilege to refuse to disclose and to prevent a witness from disclosing a communication if (1) the

person claims the privilege, (2) the communication was a penitential communication, (3) the witness is the penitent or the minister, and (4) the person claiming the privilege is the penitent, or the minister making the claim on behalf of an absent penitent.

e. Privilege Against Self-Incrimination (K.S.A. 60-425)

A witness has a privilege to refuse to disclose any matter that will incriminate such witness, unless the privilege has been lost under K.S.A. 60-437. See K.S.A. 60-424.

F. ATTORNEY AS WITNESS

An attorney may be a witness. The lawyer-client privilege, however, would be available. Ethical considerations may require an attorney to withdraw from a case if the attorney gives testimony with regard to the merits of the case. See S. Ct. Rule 225, DR 5-101, 5-102.

III. MANNER OF PRESENTATION OF EVIDENCE

A. DIRECT EXAMINATION

1. Scope (K.S.A. 60-243[b])

The questions asked should be definite and specific. Questions calling for conclusions of law or fact are improper unless the witness is testifying as an expert witness.

2. Leading questions are those which suggest to the witness the answer desired.

As a general rule, leading questions should not be used in direct examination.

Some exceptions to the general rule are as follows:

a. Leading questions may be asked to elicit information not in dispute.

b. A judge may ask leading questions of a witness who has difficulty in testifying because of age or disability.

c. A party may interrogate any unwilling or hostile witness by asking leading questions. K.S.A. 60-243(b).

d. A witness's memory may be refreshed by asking leading questions.

e. A judge may permit leading questions to impeach one's own witness.

f. Leading questions may be asked of an adverse party. K.S.A. 60-243(b).

Whether leading questions should be permitted in any particular case is, in large measure, a matter of discretion for the trial court. State v. Jones, 204 Kan. 719, 727.

B. CROSS-EXAMINATION

After direct examination of a witness has been completed, the attorney for the opposing party may cross-examine the

witness to attempt to develop facts favorable to the opposing party's side, or to discredit the witness. Leading questions may be asked.

1. Scope

Except for purposes of impeachment, a witness may be cross-examined by the attorney for the opposing party only on the subject matter of his or her examination. K.S.A. 60-243(b). The scope of cross-examination of a witness is subject to reasonable control by the trial court. Manley v. Rings, 222 Kan. 258.

2. Restrictions on the Form and Content of Questions

Questions designed to draw a witness into an argument are not permitted nor are questions containing statements of fact not already in evidence. A question which is actually several questions is improper and questions which are irrelevant or insulting should be excluded. If a witness's answer is responsive to the question, he or she is entitled to respond fully without interruption.

3. Explanation of the Answer

A witness may explain an answer on cross-examination if the explanation is responsive and necessary.

IV. IMPEACHMENT OF A WITNESS (K.S.A. 60-420)

To impeach a witness is to attack the believability of a witness by oral examination or to introduce evidence to discredit the witness's testimony. A

witness may be impeached on cross-examination. Neither the rule proscribing cross-examination as to irrelevant or collateral matters nor the rule limiting cross-examination to the scope of the direct examination applies to cross-examination for the purpose of impeachment. See K.S.A. 60-420.

A. BY SHOWING PRIOR CRIME OR CHARACTER TRAIT INVOLVING DISHONESTY OR FALSE STATEMENT

Evidence of the conviction of a witness for a crime involving dishonesty or false statement is admissible for the purpose of impairing the witness's credibility. K.S.A. 60-421. Evidence of character traits involving dishonesty or untruthfulness is admissible to impair a witness's credibility. K.S.A. 60-422.

B. BY SHOWING PRIOR CONTRADICTORY STATEMENT

Subject to K.S.A. 60-422(b), evidence of prior contradictory statements is admissible for the purpose of impairing the witness's credibility.

C. BY SHOWING BIAS OR INTEREST

Evidence of bias or circumstances under which a witness may have a temptation to testify falsely is admissible for the purpose of impairing the witness's credibility.

V. EVIDENCE OF PRIOR CIVIL WRONGS OR CRIMES (K.S.A. 60-455)

Introduction of evidence that a person committed a crime or civil wrong on a specified occasion for the purposes allowed and in the manner prescribed by K.S.A. 60-455 may be permitted in a civil action as a matter of judicial discretion if all of the tests for admissibility are met.

CIVIL - AFTER TRIAL

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VII. APPEALS TO THE DISTRICT COURT

CIVIL - AFTER TRIAL

I. POST-TRIAL COMMUNICATIONS WITH JURORS

S. Ct. Rule 169 sets out instructions to be given to the jury upon completion of the jury trial but before discharge of the jury. S. Ct. Rule 181 governs the calling of jurors for hearings on post-trial motions. Implicit in both rules are standards of conduct to be followed by attorneys and jurors after trial.

II. JUDGMENTS

A. DEFINITION AND ENTRY OF JUDGMENT

A judgment is the final determination of the rights of the parties in an action. K.S.A. 60-254.

When more than one claim for relief has been presented, judgment may be entered as to one or more claims but fewer than all claims. See K.S.A. 60-254. A partial judgment is final if directed in accordance with K.S.A. 60-254(b).

Whether the trial has been to the court or to a jury, judgment may be entered only by filing a journal entry or judgment form in accordance with K.S.A. 60-258. If a judgment form is used it must be substantially similar to the form set out at K.S.A. 60-258.

B. AMENDING THE RECORD OF A JUDGMENT

A trial judge has a duty and an inherent right to correct, on its own motion or on

motion of a party and after such notice as the court requires, any errors appearing in or omissions from the record of a judgment. The correction is to be by nunc pro tunc order and may correct clerical errors or errors arising from oversight or omission.

If the case is on appeal and the record on appeal has been filed, such errors may be corrected only with permission of the appellate court. K.S.A. 60-260(a). In other situations, correction may be made at any time.

A correction may be made upon any satisfactory evidence. Personal knowledge or recollection of the judge is sufficient.

Care should be exercised so that the rights of the parties are not altered. It is a good practice to require notice to all parties and an opportunity for a hearing before correcting the judgment.

See K.S.A. 60-260(a) and Tafarella v. Hand, 185 Kan. 613, 617-618.

C. REMITTITUR; ADDITUR

1. Remittitur is the plaintiff's acceptance on the record of a reduction of a jury award to an amount determined by the court.

   The court, as a matter of discretion, may order a reduction of a jury award. The court should exercise care, however, so that the province of the jury is not invaded. If accepted by the plaintiff the reduced award is conclusive as to the amount

of the award. If the plaintiff does not accept the reduction, a new trial on the issue of damages is to be granted. The court may not compel a plaintiff to accept a reduced award.

If a defendant's motion for remittitur is granted the defendant's right to appeal may be foreclosed.

See Kirk v. Beachner Construction Co., Inc., 214 Kan. 733; Barnes v. St. Francis Hospital and School of Nursing, Inc., 211 Kan. 315; Anstaett v. Christensen, 192 Kan. 572; Slocum v. Kansas Power & Light Co., 190 Kan. 747.

2. Additur is the defendant's acceptance on the record of an increase of a jury award to an amount determined by the court. Kansas courts have no authority to increase a jury award. See Courtright v. Moore, 176 Kan. 49; Lovegren v. Carson, 176 Kan. 53.

D. REVIVAL OF A DORMANT JUDGMENT

A judgment creditor has an absolute right to have a dormant judgment revived if the application is timely. Butler v. Rumbeck, 143 Kan. 708.

III. POST-TRIAL MOTIONS

A. JUDGMENT NOTWITHSTANDING THE VERDICT (K.S.A. 60-250(b))

A trial court may not consider a motion for judgment notwithstanding the verdict unless at the close of all the evidence the moving party had moved for a directed verdict. Noll v. Schnebly, 196 Kan. 485.

The motion may be joined to a motion for a new trial.

If a verdict was returned and judgment entered, the court may reopen the judgment as if the requested verdict had been directed or, if appropriate, order a new trial, or the court may allow the judgment to stand. If no verdict was returned by the jury, the court may direct entry of judgment as if the requested verdict had been directed, or may order a new trial.

In ruling on the motion, the court may not merely substitute its judgment for that of the jury. The issue to be decided is whether there is substantial evidence to sustain the verdict of the jury and a judgment for the plaintiff. The court is required to view the evidence and inferences most favorably to the party against whom the motion is made. The credibility of the witnesses is not to be considered by the court. Fisher v. Sears, Roebuck & Co., 207 Kan. 493. See also Lord v. Jackman, 206 Kan. 22. Substantial evidence is defined at Mann v. Good, 202 Kan. 631.

B. MOTION TO AMEND OR MAKE ADDITIONAL FINDINGS (K.S.A. 60-252)

This motion requests the court to amend or make additional findings of fact or conclusions of law. It is proper if trial has been to the court or with an advisory jury. The motion must be filed not later than 10 days after entry of judgment.

C. MOTION FOR NEW TRIAL (K.S.A. 60-259)

1. Time for Filing the Motion

A motion for a new trial may be made after trial to a court or to a jury and must be served not later than 10 days after entry of judgment. The court cannot extend the 10 day period of time for serving the motion but may permit the motion to be amended.

The opposing party has 10 days after such service in which opposing affidavits must be served. The time for serving opposing affidavits may be extended by the court if good cause is shown, or by the parties by stipulation, for an additional period not exceeding 20 days.

2. Grounds for the Motion

A new trial may be granted to all or any of the parties and on all or part of the issues when it appears that the rights of a party have been substantially affected because of any of the following:

a. The trial court abused its discretion.

Judicial discretion is the power of a court to make, through the use of common sense and reason, just and fair determinations regarding matters not governed by statute or case law.

In exercising judicial discretion, a judge must have proper regard for what is just and fair under existing circumstances and must not act in an arbitrary, fanciful, or unreasonable manner. Tyler v. Cowen Construction, Inc., 216 Kan. 401.

b. Misconduct of the Jury.

Generally, jury misconduct is a prejudicial deviation from a fixed duty or definite rule of conduct. Ordinarily, consideration during deliberations of matters completely outside the evidence and issues in the case constitutes jury misconduct. Dunn v. White, 206 Kan. 278. A juror's independent investigation of a material issue of fact and subsequent report of the investigation to the jury during its deliberations is misconduct of the jury. Walker v. Holiday Lanes, Inc., 196 Kan. 513.

At the hearing on the motion, inquiry is limited to the alleged misconduct. The thought processes of a juror are not subject to review. See K.S.A. 60-441; Walker v. Holiday Lanes, Inc., 196 Kan. 513.

In challenging a verdict for misconduct of the jury, a juror may be questioned or evidence received as to physical facts, conditions or occurrences either within or without the jury room, which were material to the issues being determined. Kincaid v. Wade, 196 Kan. 174.

c. Misconduct of a Party.

Misconduct of a party is conduct by a party or the party's attorney so prejudicial that it deprives the opposing party of a fair trial. See e.g., Mesecher v. Cropp, 213 Kan. 695.

d. Accident or surprise which ordinary prudence could not have guarded against, or for any other cause whereby the party was not afforded a reasonable opportunity to present evidence and be heard on the merits of the case.

e. Erroneous rulings or instructions of the court.

Only trial errors that are prejudicial to the rights of a party may be grounds for granting a new trial. See K.S.A. 60-261; Schneider v. Washington National Ins. Co., 204 Kan. 809.

Unless an objection stating the matter objected to and the reasons for the objection is made by a party, the giving of or failure to give any instruction is not prejudicial error. No objection is necessary, however, if the instruction given is clearly erroneous. K.S.A. 60-251.

f. The verdict or decision was given under the influence of passion or prejudice.

Frequently, misconduct of a party also has occurred and the passion or prejudice is the result of the party's misconduct. The amount of damages awarded by a jury may indicate the existence of passion or prejudice.

g. The verdict or decision is in whole or in part contrary to the evidence.

h. There is newly discovered evidence material for the moving party which could not have been discovered and produced at the trial with reasonable diligence.

Evidence which was known at the time of the trial may not later be designated newly discovered evidence. Augusta Oil Co., Inc. v. Watson, 204 Kan. 495.

Evidence that is incompetent, even though newly discovered, may not be grounds for granting a new trial. Trimble, Administrator v. Coleman Co., Inc., 200 Kan. 350, 360.

Lack of diligence on the part of the moving party can be a basis for denying a motion for new trial on grounds of newly discovered evidence. Perry v. Schoonover Motors, 189 Kan. 608.

i. The verdict or decision was procured by the corruption of the party obtaining it.

If this is established the new trial must be granted as of right with all costs to date charged to the party obtaining the verdict or decision. K.S.A. 60-259(a).

3. Production of Evidence at the Hearing

If the ground for the motion for new trial

is that it was error to exclude evidence, that there was a lack of fair opportunity to produce evidence, or that there is newly discovered evidence, the evidence must be produced at the hearing on the motion. The evidence is to be presented by affidavit. A judge may authorize the evidence to be presented by deposition or oral testimony. The opposing party may rebut the evidence in the same way.

4. Granting the Motion for New Trial

A trial court has no discretion to grant a new trial merely because it is dissatisfied with the verdict. The grounds established by K.S.A. 60-259 for granting a new trial are exclusive. Herbel v. Endres, 202 Kan. 733.

After motion for a new trial by a party, the court may grant a new trial on grounds not specified in the motion. The court, however, must specify the grounds for granting the motion. See Landscape Development Co. v. Kansas City P. & L. Co., 197 Kan. 126.

If the court grants a new trial on its own initiative it must specify the grounds (limited to those set out in K.S.A. 60-259) for granting a new trial. A new trial may be granted by a court on its own initiative not later than 10 days after entry of the judgment. K.S.A. 60-259(e).

A new trial may be granted on the issue of damages only, but should not be granted if it appears that the verdict resulted from a compromise on the issue of liability.

On granting a new trial, generally, see Kirk v. Beachner Construction Co., Inc., 214 Kan. 733; Smith v. Newell, 210 Kan. 114; Dunn v. White, 206 Kan. 278; Timmerman v. Schroeder, 203 Kan. 397; Furstenberg v. Wesley Medical Center, 200 Kan. 277; Corman, Administrator v. WEG Dial Telephone, Inc, 194 Kan. 783; Levy v. Jabara, 193 Kan. 595; Henderson v. Kansas Power & Light Co., 188 Kan. 283; Domann v. Pence, 183 Kan. 135.

IV. RELIEF FROM JUDGMENT OR ORDER (K.S.A. 60-260)

A. GENERAL CONSIDERATIONS

A party may seek relief from a final judgment or order through the use of the motion governed by K.S.A. 60-260. This statute, however, does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief, as authorized by K.S.A. 60-309, to a defendant not actually personally notified of the pendency of an action, or to set aside a judgment for fraud upon the court.

A K.S.A. 60-260 motion must be made within a reasonable time after the entry of judgment. Generally, what is a reasonable time is a matter of judicial discretion. The statute, however, requires the motion to be made not later than one year after the judgment or order was entered if the grounds for the motion are mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; or fraud, misrepresentation, or other misconduct of an adverse party.

See Needham v. Young, 205 Kan. 603; and Wichita City Teachers Credit Union v. Rider, 203 Kan. 552, for the meaning of "within a reasonable time."

The motion does not suspend the operation or affect the finality of the judgment.

B. GROUNDS FOR RELIEF

On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for any of the following reasons:

1. Mistake, inadvertence, surprise, or excusable neglect;

2. Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under K.S.A. 60-259(b);

3. Fraud, misrepresentation or other misconduct of an adverse party (In attempting to set aside a judgment on the grounds of fraud, the moving party must establish fraud by clear and convincing evidence. Cool v. Cool, 203 Kan. 749);

4. The judgment is void (This may include lack of jurisdiction. A void judgment may be attacked collaterally, or by motion for relief from judgment);

5. The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated,

or it is no longer equitable that the judgment should have prospective application; or

6. Any other reason justifying relief from the operation of the judgment.

Granting or denying a motion to set aside a default judgment is a matter of judicial discretion. Wilson v. Miller, 198 Kan. 321. See K.S.A. 60-255(b).

Relief may not be granted under K.S.A. 60-260 to set aside past due alimony. See Blair v. Blair, 210 Kan. 156; K.S.A. 60-1610(b)(2), as amended.

V. STAY OF PROCEEDINGS TO ENFORCE JUDGMENTS (K.S.A. 60-262)

A. MANDATORY AUTOMATIC STAY

No execution may issue upon a judgment nor may proceedings be taken for its enforcement until 10 days have lapsed since the judgment was entered. K.S.A. 60-262(a).

There is no such automatic stay if the judgment is an interlocutory or a final judgment in an action for an injunction or in a receivership action. K.S.A. 60-262(a).

B. STAYS THAT MAY BE GRANTED PRIOR TO APPEAL AS A MATTER OF JUDICIAL DISCRETION

The court may order a stay after the entry of an interlocutory or a final judgment and before an appeal is taken in an action for an injunction or a receivership action. K.S.A. 60-262(a).

On such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a: K.S.A. 60-250 motion for judgment in accordance with a motion for directed verdict; K.S.A. 60-252(b) motion to amend or make additional findings; K.S.A. 60-259 motion for new trial or motion to alter or amend a judgment; or a K.S.A. 60-260 motion for relief from a judgment or order. K.S.A. 60-262(b).

When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in K.S.A. 60-254(b), the court may stay enforcement of that judgment until a subsequent judgment is entered. See K.S.A. 60-262(g).

C. STAYS UPON APPEAL

When an appeal is taken, the court must grant a stay if the appellant gives a satisfactory supersedeas bond. This does not apply to stays of interlocutory or final judgments in injunction or receivership actions. K.S.A. 60-262(d).

If an appeal is taken by the state or by an officer or agency of the state, or by direction of any department of the state, no bond or other security may be required as a condition for granting a stay. K.S.A. 60-262(e).

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the judge may suspend, (stay the operation

of), modify, restore, or grant an injunction during the pendency of the appeal upon such terms as the judge considers proper for the security of the rights of the adverse party. K.S.A. 60-262(c).

VI. PROCEEDINGS TO ENFORCE JUDGMENTS

A. EXECUTIONS (K.S.A. 60-2401 et seq.)

1. Definitions and General Considerations

Executions are of two types: general and special.

A general execution is a direction to an officer to seize any nonexempt property of a judgment debtor and to have the property sold in satisfaction of the judgment. K.S.A. 60-2401(a).

A special execution (known also as an "order of sale" or a "judicial sale") is a direction to an officer to effect some action as to some specified property in a manner that the court deems necessary in adjudicating the rights of parties to an action. K.S.A. 60-2401(a). A sale of property upon mortgage foreclosure is an example of a judicial sale. Aguilera v. Corkill, 201 Kan. 33.

The distinction between a general execution and special execution is discussed in Lambert Lumber Co. v. Petrie, 191 Kan. 709, and The First National Bank of Plainville v. S. T. Barons, 109 Kan. 493.

The procedure to be followed for an execution involving real property is set out at K.S.A. 60-2401 et seq. The procedure to be followed for an execution involving personal property is set out

at K.S.A. 60-2401 et seq., 60-1006, and 84-9-501, as amended. See also K.S.A. 16a-5-103.

Executions may be issued only from the court that rendered the judgment. K.S.A. 60-2202(a), as amended. Needham v. Young, 205 Kan. 603.

2. General Executions

The property to be seized and sold may be personal or real. K.S.A. 60-2401(e).

K.S.A. 60-2301 et seq. designates what property is exempt property.

3. Judicial Sales (Special Executions)

Judicial sales are to be levied and executed in a manner determined by the court. K.S.A. 60-2401(e).

There may be special statutory rules regarding judicial sales in certain situations. See e.g., K.S.A. 60-1003(c)(4) (Partition actions).

A court may decline to confirm a sale if the bid is substantially inadequate or, in ordering a sale or resale after a hearing, may fix a minimum or upset price, which must be bid if the sale is to be confirmed. Additionally, the court may direct, upon application for the confirmation of the sale, as a condition to confirmation, and if it has not fixed previously an upset price, that the fair value of the property (regardless of the actual sale price) be credited against the judgment. K.S.A. 60-2415(b). The court may confirm the

sale on the condition that a deficiency judgment will not be rendered.

An order confirming a judicial sale is a final order on all matters within the proper scope of the proceedings. See Aguilera v. Corkill, 201 Kan. 33, 37.

A court may exercise discretion to set aside a decree in a judicial sale because of irregularities. Seal v. Scott, 128 Kan. 766. Any interested party may move to set aside a sale, prior to confirmation, because of irregularities. Solomon National Bank v. Birch, 121 Kan. 334, 336.

A sheriff's deed issued to complete a judicial sale, although absolute in form, conveys no greater title than is authorized by the judicial proceedings upon which it is based. Aguilera v. Corkill, 201 Kan. 33.

4. Statutory Right to Redeem Property Sold under Execution

Statutory rights of redemption are set out at K.S.A. 60-2414, as amended. Except as otherwise specifically provided by statute, a defendant owner may redeem, in accordance with the statute, any real property sold under a general or special execution.

Notwithstanding K.S.A. 60-1003(c)(4), there is no statutory right of redemption after sale of real property as a part of partition proceedings. See Parks v. Snyder, 126 Kan. 446, 452.

B. GARNISHMENT (K.S.A. 60-714 et seq.)

Garnishment is either a form of attachment an aid to attachment, in lieu of execution or in aid of execution. K.S.A. 60-714.

1. Prejudgment Garnishment (K.S.A. 60-715)

Except as provided in K.S.A. 1982 Supp. 60-1607(c), an Order of Garnishment before judgment may be obtained only upon order o a judge of the district court pursuant to the procedure to obtain an order of attachment.

Garnishment proceedings may not be commenc before judgment on plaintiff's claim in th principal action if the garnishment proceedings would affect the earnings of the defendant, except as provided by K.S.A. 1982 Supp. 60-1607(c).

A special procedure in garnishment to enforce support orders is provided for in K.S.A. 1982 Supp. 60-1607(c).

No order of garnishment before judgment ma be issued without notice and hearing. North Georgia Furnishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 42 L.Ed.2d 751, 95 S.Ct. 715 (1975).

2. Postjudgment Garnishment (K.S.A. 60-716)

As an aid to the enforcement of a judgment an order of garnishment may be issued by the clerk of the court from which executio is issuable in connection with or independently of an execution as designated by th written direction of the party entitled to enforce the judgment. The court from whic execution is issuable is the Kansas court that rendered the judgment. K.S.A. 60-220

Needham v. Young, 205 Kan. 603. The written direction for garnishment must state whether the order of garnishment is to be issued for the purpose of attaching earnings or for the purpose of attaching other property of the judgment debtor. If the garnishment order is issued for attachment of earnings for enforcement of (1) an order of any court for the support of any person, (2) an order of any court of bankruptcy under chapter XIII of the federal bankruptcy act, or (3) a debt due for any state or federal tax, the written direction must so state.

No bond is required for an order of garnishment issued after judgment.

3. The Order of Garnishment (K.S.A. 60-717, as amended)

a. Earnings

Earnings means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise. K.S.A. 60-2310(a)(1), as amended.

An order of garnishment issued after judgment and independently of an attachment for the purpose of attaching earnings of the defendant should be in the form prescribed by K.S.A. 60-717(a)(2), as amended.

An order of garnishment for attaching earnings of the defendant attaches the nonexempt portion of the defendant's earnings for the entire normal pay period in which the order is served. K.S.A. 60-717(c), as amended.

For restrictions on wage garnishment see K.S.A. 60-2310(b), as amended. Note that K.S.A. 60-2310(f), as amended prohibits a Kansas court from making, executing, or enforcing any order or process that violates the restrictions on wage garnishment.

The restrictions on the amount of disposable earnings set out at K.S.A. 1981 Supp. 60-2310(b), as amended, do not apply to an order of a bankruptcy court under chapter XIII of the federal bankruptcy act, or to any debt due for any state or federal tax. K.S.A. 1982 Supp. 60-2310(g) places restrictions on the amount of disposable earnings subject to garnishment for the support of any person. See also K.S.A. 1982 Supp. 60-718(b) IV.

The court may direct a continuing order of garnishment to enforce a support order. K.S.A. 1981 Supp. 60-721(b).

b. Property other than Earnings

An order of garnishment issued independently of an attachment either before or after judgment and for the purpose of attaching property, other than earnings, should be in the form prescribed by K.S.A. 60-717(a)(1), as amended.

An order of garnishment for the purpose of attaching property, other than earnings, has the effect of attaching (1) all property, funds, credits or other indebtedness belonging to or owing the defendant which is in the possession or under the control of the garnishee, and all such credits and indebetedness due

from the garnishee to the defendant at the time of service of the order, and (2) all such property coming into the possession or control of the garnishee and belonging to the defendant between the time the order is served on the garnishee and the time the garnishee files an answer. Such order of garnishment has a different effect if the garnishee is an executor or administrator, and the defendant is or may become a legatee or distributee of the estate. See K.S.A. 60-717(c).

c. Service and Return

See K.S.A. 60-717(b), as amended.

4. The Answer of the Garnishee

The procedure and form to be used for the garnishee's answer is prescribed by K.S.A. 60-718(a)(1), as amended (property other than earnings), and K.S.A. 60-718(a)(2) (earnings).

Upon the filing of the answer, the clerk of the court must have a copy of the answer mailed to the plaintiff and the defendant. Within 10 days after the answer is filed, either the plaintiff or the defendant may controvert the answer of the garnishee. If the answer is not controverted it is deemed to be confessed. K.S.A. 60-718(c), as amended.

If the garnishee fails to answer as required, judgment may be taken against the garnishee in favor of the plaintiff after notice to the garnishee in accordance with K.S.A. 60-206. The garnishee's failure to answer in time may be due to "excusable neglect." See Boyce v. Boyce,

206 Kan. 53, for the effect of excusable neglect.

5. Trial (K.S.A. 60-720)

Trial after the answer of the garnishee is controverted is to the court after notice to all parties.

If the garnishee is a nonresident of the county in which the original case is filed the court may transfer the garnishment proceedings to the county of the garnishee residence for trial of the issues.

If a garnishment order is issued before judgment and the answer of the garnishee is controverted, the court may stay the trial of this issue until after plaintiff' claim against the defendant is determined.

A defendant may defend the garnishee's answer.

The garnishee may assert any set off the garnishee may have against the defendant. The garnishee may defend the main action for a defendant who defaults.

The burden of proving the garnishee's answer incorrect is on the party attacking the answer. If the garnishee claims a set off against the defendant, however, th burden of proving the set off is on the garnishee.

The defendant may post bond, as provided in K.S.A. 60-722, in order to protect the plaintiff. If the defendant does, the garnishee is thereby discharged from the garnishment order.

6. Application of Garnishment Laws to Public Officers and Employees, and to the State and its Governmental Subdivisions (K.S.A. 60-723)

Subject to the conditions and exemptions of the garnishment laws, garnishment proceedings may be brought against state government employees, the state of Kansas, and its governmental subdivisions.

7. Exceptions (K.S.A. 60-724)

No judgment may be rendered in garnishment by reason of the garnishee's:

a. having drawn, accepted, made, endorsed, or guaranteed any negotiable instrument or other security; or

b. holding money on a claim not arising out of contract and not liquidated as to amount; or

c. holding money or property exempt by law, or the proceeds from exempt money or property.

8. Garnishment and Negligent Failure to Settle a Claim

In defending and settling claims against its insured, an insurer on a liability or indemnity policy owes to the insured a duty to act in good faith and without negligence. If the insurer fails to do so, the insurer will be held liable for the full amount of the insured's resulting loss, even if that amount exceeds policy limits. Rector v. Husted, 214 Kan. 230.

This rule is applicable to garnishment as follows: If a plaintiff secures a judgment against a defendant in excess of the limits of the defendant's insurance policy the plaintiff may seek from the insurance company the full amount of the judgment by garnishing the insurance company, claiming bad faith or negligent failure with regard to settling the claim. Garnishment proceedings will reach the garnishee insurance company on this issue and the garnishee's answer makes up the issue. Trial of the issue of bad faith or negligence is to the court. No jury trial may be demanded as of right. Bollinger v. Nuss, 202 Kan. 326.

C. ATTACHMENT (K.S.A. 60-701 et seq.)

Attachment is not a cause of action; it is a method by which a judgment may be enforced. A petition must first be filed in every case, stating a claim upon which relief may be granted. Attachment is not limited to actions in which recovery of money is sought but, if otherwise proper, is available in all civil actions. The purpose of attachment includes preventing removal of property from the jurisdiction of the court, and securing jurisdiction over a defendant's property in proceedings in rem.

1. Grounds for Attachment (K.S.A. 60-701)

Subject to the provisions of K.S.A. 60-703, a plaintiff at or after commencement of any civil action may have, as an

incident to relief sought, one or more attachments against the property of any or all defendants, when such defendant has done or is about to do an act specified in the statute, or is a non-resident or a foreign corporation.

2. Attachments on Demands not Due (K.S.A. 60-702, as amended)

"Demand" means an existing debt which wil become due upon lapse of time. It does not include a liability which depends on the happening of a contingency or some future event. Attachment is not available, therefore, to secure future child support. Trunkey v. Johnson, 154 Kan. 72

Subject to the provisions of K.S.A. 60-703, as amended, an action may be commenced on a demand not yet due and an attachment may issue upon the giving of a bond in any of the cases mentioned in K.S.A. 60-701, but judgment may not be rendered against a defendant until maturity of the demand.

3. How Obtained (K.S.A. 60-703, as amended)

No order of attachment shall be issued before judgment on plaintiff's claim where the property of the defendant to be attached is in the possession of a third party and is in the form of earnings due and owing to the defendant. See K.S.A. 60-2310(a)(1), as amended, for the meaning of "earnings." Otherwise an order of attachment must be issued by a judge of the district court upon the filing of a petition stating the claim

upon which relief may be granted and the filing of an affidavit or an affidavit and bond as required setting forth one or more of the specific grounds for attachment listed in K.S.A. 60-701.

A bond is required in every case except in actions instituted on behalf of the state of Kansas or of a county thereof.

The order of attachment may be executed on a Sunday or a legal holiday if the affidavit states that the party seeking attachment will lose the benefit thereof unless the writ is issued or served on such day.

4. Form of Affidavit
(K.S.A. 60-704, as amended)

The affidavit must be made by the plaintiff or some person for the plaintiff.

The affidavit must state:

a. The grounds upon which the attachment is sought, specifying with particularity the facts in support of such grounds,

b. That plaintiff has a just claim against defendant, and

c. The amount which affiant believes plaintiff ought to recover, after allowing all credits and set offs.

5. Bond (K.S.A. 60-705)

a. Form and Contents.

The bond must be executed by the plaintiff and one or more sufficient sureties, in double the amount of plaintiff's claim, or such lesser amount as is approved by order of the judge.

The bond must be to the effect that the plaintiff will pay to the defendant all damages which the defendant may sustain by reason of the attachment, if wrongfully obtained, or from a wrongful levy thereof if such levy was directed by the plaintiff or the plaintiff's attorney.

The bond must be examined by the clerk of the court as to its sufficiency and, if approved by the clerk, such approval must be noted thereon.

b. Insufficiency of the Bond

If at any time it is made to appear to the judge that the bond is insufficient in amount or as to the surety thereon, the judge, after reasonable notice to the plaintiff, may order bond and further security. If the plaintiff fails to comply with such order within the time prescribed by the judge, the attachment will be dissolved at plaintiff's cost.

6. The Attachment Order (K.S.A. 60-706, as amended)

a. Form

The attachment order is issued in the form set forth in this statute.

b. Manner of Service

1) The attachment order must be served on the defendant and return made as in the case of an ordinary summons.

2) The order of attachment must be executed by the officer without delay. The officer must go to the place where defendant's property may be found and declare publicly that he or she attaches such property. If personal property is attached, the officer and two disinterested appraisers who are residents of the county must under oath inventory and appraise the property at its fair market value. The inventory and appraisal must be signed by the officer and appraisers, and returned with the order.

7. Taking Possession of Attached Property (K.S.A. 60-706(b)(3) and(4), as amended)

If tangible personal property, the officer must take possession if he or she can reasonably do so. If attached property is in the possession of a person other than the defendant, the officer must declare to such person that the officer attaches the property and must summon such person as garnishee by serving upon the person a copy of the order of attachment. Such person also should be furnished with a garnishee answer form.

If real property is attached, the officer must leave a copy of the attachment order with the occupant and shall state the name of the occupant in the return. If no occupant is found, the officer must leave a copy of the order in a conspicuous place on the property.

8. Attaching Credits.
(K.S.A. 60-706(b)(5), as amended)

When credits of the defendant are to be attached, the officer shall declare to the debtor of the defendant that the officer attaches all debts due from the debtor to the defendant, or so much as shall be sufficient to satisfy the debts, interest, or damages and costs, and shall summon such debtor as a garnishee by serving upon him or her a copy of the order of attachment. The debtor also should be furnished with a garnishee answer form.

9. Retention of Possession by the Defendant
(K.S.A. 60-707, as amended)

A person in possession of attached property may retain or regain possession at any time prior to final judgment or sale of the property under court order by giving bond, with one or more sureties, in an amount which is either equal to the amount of the plaintiff's claim and probable court costs as shown in the order of attachment, or equal to the amount of the appraisal of the property as determined pursuant to K.S.A. 60-706(b), as amended, or in such lesser amount as is ordered by

the court. The person giving bond has the option to give bond in an amount equal to either of the first two amounts just listed. See K.S.A. 60-707, as amended. The conditions of the bond shall be that the property or the value thereof will be available to apply on any judgment rendered. The sufficiency of the bond shall be determined by the officer levying the attachment.

10. Compensation of Officer (K.S.A. 60-709)

The court may allow the officer taking possession of property under an order of attachment reasonable costs, including the cost of taking care of the property. Such amount is to be taxed as costs in the action.

11. Sale of Perishable Property (K.S.A. 60-710)

If the property actually seized under the order of attachment is perishable or is likely to materially depreciate in value before termination of the suit, or the keeping of which would be attended with unreasonable loss of expense, a judge of the district court of the county where the suit is pending or where the property is located may order it sold, on such terms and conditions as the judge may direct by the officer having charge of the property. Return of the sale and proceedings thereon shall be made at the time directed by the judge and shall be made to and filed with the clerk of the court in the county in which the suit is pending. The title

of any purchaser of such property shall not be affected by any proceedings brought under K.S.A. 60-309 (opening default judgment rendered on service by publication).

12. Appointment of a Receiver (K.S.A. 60-711)

The judge may appoint a receiver in aid of attachment, subject to the provisions of article 13 of chapter 60 of the Kansas Statutes Annotated. If a going business, numerous income producing properties, land with growing crops, or extensive accounts receivable were attached, the court could utilize this authority to solve problems relating to management of such property.

VII. APPEALS TO THE DISTRICT COURT

Appeal from orders or from a final decision of a district magistrate judge is to an associate district judge or to a district judge. If the trial before the district magistrate judge was without a record, the appeal will be a trial de novo. If there was a record, the appeal will be on the record. K.S.A. 20-302b(c), as amended. See K.S.A. 60-2103a, as amended, for appellate procedure to be used by the associate district judge or district judge.

CRIMINAL - BEFORE TRIAL

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IX. COMPETENCY OF THE DEFENDANT TO STAND TRIAL

I. PRELIMINARY PROCEEDINGS

A. THE COMPLAINT: SUFFICIENCY AND PURPOSE

The judge, as magistrate, must determine that the complaint states facts sufficien to indicate a specific violation of the laws of the state of Kansas or the penal ordinances of a municipality of the state A verified complaint that merely repeats the language of a criminal statute will not be sufficient to support a finding of probable cause. See Wilbanks v. State, 224 Kan. 66. A complaint should contain sufficient factual information to enable the magistrate to make an impartial and detached finding of probable cause.

The purpose of a complaint is to disclose sufficient factual information to enable the magistrate to make an intelligent and impartial finding that there is probable cause to believe that a specific crime ha been committed and that the accused is th person who committed it, and to inform th accused of the particular offense with which he or she is charged.

B. PROBABLE CAUSE AND ARREST WARRANTS

If the complaint or affidavit filed with the complaint or if other competent evidence shows that there is probable cause to believe that a crime has been committed and the accused is the person who committed it, a warrant for the arre of the accused should be issued. K.S.A. 22-2302.

The warrant must

1. Be signed by the magistrate;

2. Contain the name of the accused, or if the name is not known any name or description by which the accused may be identified with reasonable certainty;

3. Describe the crime charged; and

4. Specify the amount of the appearance bond and whether it is to be by surety or personal recognizance. K.S.A. 22-2304.

C. SUMMONS IN LIEU OF ARREST WARRANT; RELEASE OF THE DEFENDANT AFTER WARRANTLESS DETENTION FOR A MISDEMEANOR

A summons may be issued in lieu of an arrest warrant if the prosecuting attorney so requests or in the case of a complaint alleging commission of a misdemeanor, the magistrate determines that a summons should be issued.

A summons is a written order issued by a magistrate directing a person to appear before a designated court at a stated time and place in order to answer a charge pending against the person.

If an accused fails to appear in response to the summons an arrest warrant may be issued.

If a law enforcement officer detains any person for a misdemeanor without having an arrest warrant, the officer may serve the person with a written notice to appear in court. If the person signs the

notice, thereby promising to appear at the time and place specified, the officer may release the defendant and file without unnecessary delay a complaint in the court which has jurisdiction over the person. If the defendant fails to appear as required in the notice, an arrest warrant may be issued. See K.S.A. 22-2408, as amended, and 8-2106, as amended.

II. PROCEDURE AFTER ARREST

A. FIRST APPEARANCE (K.S.A. 22-2901)

When an arrest is made in the county where the crime is alleged to have been committed, the person arrested must be taken without unnecessary delay before a magistrate of the court from which the warrant was issued. If the arrest was made on probable cause without a warrant the person arrested must be taken before the nearest available magistrate without unnecessary delay and a complaint must be filed.

When an arrest is made in a county other than where the crime is alleged to have been committed the person arrested may be taken without unnecessary delay directly to the county where the crime is alleged to have been committed or, at the request of the person arrested, to the nearest available magistrate.

At the first appearance, the magistrate fixes the terms and conditions of the appearance bond, commits the accused to jail, or orders the accused to be delivered to a law enforcement officer of the county where the crime is alleged to have been committed.

B. RELEASE OF THE DEFENDANT PRIOR TO TRIAL (RECOGNIZANCE OR BAIL)

Throughout Kansas statutory and case law, the terms "recognizance" and "bail" are used interchangeably.

The amount of the recognizance should be the sum necessary to insure the appearance of the accused. Excessive bail, however, is prohibited.

Guidelines and criteria to be considered for release on recognizance are found at K.S.A. 22-2801, and 22-2802, as amended.

At the defendant's first appearance before a judge, the defendant must be ordered released, pending the preliminary examination or trial, if there is executed an appearance bond in the amount specified by the magistrate and conditioned upon the appearance of the defendant at the time and place ordered. The magistrate may impose any of the conditions listed in K.S.A. 22-2802, as amended, to assure the defendant's appearance.

The appearance bond must be executed with a sufficient number of solvent sureties who are Kansas residents, unless the magistrate determines that requiring sureties is not necessary to assure the defendant's appearance. A deposit of cash in the amount of the bond may be made in lieu of the execution of the bond by sureties.

The appearance bond must set forth all of the conditions of release. The magistrate may impose additional or different conditions of release at any time.

A defendant who continues to be detained as the result of his or her inability to meet the conditions of release has a right to a review of the conditions without unnecessary delay.

If there is a breach of condition of an appearance bond the court in which the bond is deposited must declare a forfeiture of the bail. The court may direct, however, that the forfeiture be set aside, upon such conditions as the court imposes, if justice does not require enforcement of the forfeiture. K.S.A. 22-2807.

III. THE DEFENDANT'S RIGHT TO COUNSEL

A defendant charged with any felony is entitled to have the assistance of counsel at every stage of the proceedings against the defendant. K.S.A. 22-4503.

A defendant charged with a misdemeanor is also entitled to the assistance of counsel and may not be sentenced to imprisonment unless he was afforded that right; however, lesser penalties, such as a fine may be imposed upon a misdemeanant who did not have the assistance of counsel. Scott v. Illinois, 440 U.S. 367, 59 L.Ed.2d 383, 99 S.Ct. 1158 (1979).

If the defendant appears before any court without counsel, the court must inform the defendant of the right to counsel and that counsel will be appointed for the defendant if indigent. Indigency is to be determined in accordance with K.S.A. 22-4504.

If at any stage of the proceedings the court finds that the defendant is financially unable to pay retained counsel, the court may appoint counsel. See K.S.A. 22-4511. Upon a showing of good cause, the court may substitute one appointed attorney for another.

The defendant may waive the right to counsel if the waiver is voluntary, intelligent, and competent, and if the defendant is aware of the absolute right to counsel.

Some of the federal case law regarding the defendant's right to counsel is as follows:

Argersinger v. Hamlin, 407 U.S. 25
McConnell v. Rhay, 393 U.S. 2
In re Gault, 387 U.S. 1
White v. Maryland, 373 U.S. 59
Douglas v. California, 372 U.S. 353
Gideon v. Wainwright, 372 U.S. 335

VI. PRE-TRIAL MOTIONS

A. GENERAL CONSIDERATIONS

Any defense or objection capable of determination without trial of the general issue may be raised before trial by motion. K.S.A. 22-3208(2).

Any objection or defense based on defects in the institution of the prosecution or in the complaint, information, or indictment other than that it fails to show the court's jurisdiction or to charge a crime may be raised only by motion before trial, unless the court grants relief from the waiver. See K.S.A. 22-3208(3).

Pre-trail motions to dismiss must be made before arraignment or within 20 days after the plea is entered unless otherwise ordered by the court in accordance with K.S.A. 22-3208(4).

B. MOTIONS TO SUPPRESS INVOLUNTARY CONFESSION OR ADMISSION (K.S.A. 22-3215)

A motion to suppress a confession or admission on the grounds that it was made involuntarily usually must be made before trial and in writing, although K.S.A. 22-3215(6) gives the judge discretion to allow such a motion at trail. Discretion to allow such a motion at trial should be exercised rarely, if ever, due to the procedural problems that will arise because jeopardy already will have attached. If there was no opportunity to make the motion prior to trial or if the defendant was not aware of the ground for the motion, such a motion may be made at trial. To avoid this and the resulting procedural problems, the judge always should ascertain before trial whether there are confessions or admissions to be introduced into evidence, and whether there will be a motion to suppress such confessions or admissions that will require a Jackson v. Denno hearing. If there are, the hearing always should be held before trial.

If a defendant files a motion to suppress a confession or admission and alleges grounds which, if proven, would show the confession or admission to have been involuntary, and therefore, inadmissible the court must conduct a Jackson v. Denno hearing, Jackson v. Denno, 378 U.S. 368; State v. Duncan, 221 Kan. 714, to determine whether such confession or admission was voluntary or involuntary. This evidentiary hearing must be conducted outside

the presence of the jury, K.S.A. 60-408, and the prosecution has the burden of proving that the confession or admission is admissible. K.S.A. 22-3215(4). To prove admissibility, the state must show that the defendant had been advised fully of his or her rights as set out in Miranda v. Arizona, 384 U.S. 436, and that the defendant knowingly and voluntarily waived those rights. See also State v. McVeigh, 213 Kan. 432. If found to have been involuntary, the confession or admission may not be admitted into evidence. If found by the judge to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

C. MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE (K.S.A. 22-3216)

A defendant may move in writing to suppress as evidence and for the return of property obtained by an allegedly unlawful search and seizure. Such a motion usually must be made before trial, although K.S.A. 22-3216(3) gives the judge discretion to allow such a motion at trial. Discretion to allow such a motion at trial should be exercised rarely, if ever, due to procedural problems that will arise because jeopardy already will have attached. If there was no opportunity to make the motion prior to trial or if the defendant was not aware of the ground for the motion, such a motion may be made at trial. To avoid this and the resulting procedural problems, the judge always should ascertain before trial whether there will be a motion to suppress illegally seized evidence and,

if so, the judge should hold a hearing on the motion prior to trial.

If the motion is granted, K.S.A. 22-3216 governs the disposition of any property obtained by an unlawful search and seizure. See the Search Warrants section of the Miscellaneous chapter.

A hearing on the motion always must be held outside the presence of the jury and the judge is required to receive evidence at the hearing on any issue of fact necessary to determine the motion. The burden of proving that the search and seizure was lawful is on the prosecution.

The trial court, in its discretion, may reentertain a motion to suppress evidence made and ruled on prior to trial if at trial new or additional evidence is produced that is material to the issue or substantially affects the credibility of the evidence adduced at the pre-trial hearing on the motion. State v. Jackson, 213 Kan. 219.

V. THE PRELIMINARY EXAMINATION

A. PURPOSE

The preliminary examination is held to determine whether a felony has been committed and whether there is probable cause to believe that the defendant committed it. If the determination is affirmative, the defendant must be bound over for arraignment, otherwise the defendant must be discharged.

B. PROCEDURE

The preliminary examination must be conducted within 10 days after the arrest or first appearance of the defendant. A continuance of 15 days must be granted on the application of either party. Further continuances may be granted upon a showing of good cause.

The defendant must be personally present and witnesses must be examined in the defendant's presence. The defendant has the right to cross-examine witnesses against the defendant and to compel the attendance of witnesses.

C. RECORD (K.S.A. 22-2904)

The court may require a record to be made of the preliminary examination and must do so if requested by either party. Costs of preparing the record must be paid by the party requesting it. Costs of preparing a record requested by an indigent defendant are to be borne by the county.

D. EFFECT OF WAIVER

If the defendant waives the preliminary examination the defendant must be bound over for arraignment.

VI. ARRAIGNMENT (K.S.A. 22-3205)

Arraignment is conducted in open court and consists of a reading of the charge to the defendant, or a statement of the substance of the charge, and the ascertainment of the defendant's plea.

The defendant must be present personally and must be given a copy of the indictment or information before he is required to plead. If the crime is a misdemeanor,

however, the defendant with the approval of the court may appear by counsel.

When the defendant must be arraigned is specified in K.S.A. 22-3206, as amended.

The defendant may waive a formal arraignment. The court should inquire whether the defendant understands the meaning of the waiver and should be sure that the defendant understands the substance of the charge.

VII. ACCEPTING GUILTY PLEAS AND PLEAS OF NOLO CONTENDERE

Before accepting a plea of guilty or nolo contendere:

A. Determine that the defendant is the person named in the information, indictment, or complaint, and ascertain his or her correct name;

B. Determine the defendant's age;

C. Verify that the defendant has counsel who is present with the defendant;

D. Verify that the defendant has been furnished a copy of the information, or indictment, has read it, and understands the charge;

E. Remind the defendant of the right to a jury trial, that the state must prove guilt beyond a reasonable doubt, and that the defendant would have the right, but no obligation, to testify and to call witnesses;

F. Remind the defendant that he or she would have the right to appeal a conviction by a trial, and a right to have counsel for an appeal;

G. Remind the defendant that a guilty plea will convict him or her of the charge, and that the defendant will have no right to a trial thereafter but will be subject to imposition of sentence; or, if a plea of nolo contendere is to be accepted, advise the defendant that a plea of nolo contendere is a formal declaration that he or she does not contest the charge, that the court may adjudge guilt thereon, and that the defendant will have no right to a trial thereafter but will be subject to imposition of sentence;

H. Remind the defendant that he or she will have no right to appeal a conviction upon a plea of guilty or nolo contendere;

I. Advise the defendant of the maximum penalty provided by law which may be imposed upon the court's acceptance of any such plea. In cases where there are multiple charges, or where the defendant is still subject to a prior sentence, advise the defendant of the fact that sentences may be imposed consecutively;

J. Ask the defendant if his or her decision to plead guilty or nolo contendere was influenced by threat, coercion, or persuasion against his or her will;

K. Ask the defendant if he or she has been promised any type of leniency in sentencing. If either the defendant or counsel advises that there has been plea bargaining, determine the nature of the plea bargaining and advise the defendant that the court is not bound by the plea bargaining;

L. Determine that there is a factual basis for the specific charges by requiring the defendant to state personally what the defendant did to cause the defendant to believe that he or she is guilty as charged; or, if a plea of nolo contendere is to be accepted, determine that there is a factual basis for a finding of guilty by requiring the prosecutor to state the substance of the testimony of the state's witnesses if the case were tried, then ask the defendant if he or she would contest any material part of that purported testimony. If the defendant would contest a material part of the purported testimony, do not accept a plea of nolo contendere. If the defendant would not contest a material part of the purported testimony, weigh the facts and determine whether the defendant is guilty;

M. Ask the defendant if he or she is pleading guilty or nolo contendere for any reason not disclosed to the court;

N. Ask the defendant's attorney if he or she is satisfied that the defendant's plea is both knowledgeable and voluntary; and

O. State that the court accepts defendant's plea of guilty or nolo contendere and that the defendant is thereby convicted on his or her own plea.

VIII. WAIVER OF JURY TRIAL OR TWELVE PERSON JURY

The defendant and the prosecuting attorney with the consent of the court may waive the right to a trial of a felony charge by a jury and, instead, have the matter tried to the court.

The judge should make sure that the defendant knowingly has waived the right and it must appear to the judge that the defendant understands the consequences of the waiver and that the waiver was made without coercion or undue influence. K.S.A. 22-3403.

The parties may agree in writing, with the approval of the court, that a jury will consist of any number less than 12. K.S.A. 22-3403.

IX. COMPETENCY OF THE DEFENDANT TO STAND TRIAL (K.S.A. 22-3302, as amended)

A. Criminal proceedings must be suspended until the competency issue is determined. Before they may resume, the judge must find that the defendant is competent to stand trial.

B. The defendant must be present personally at all proceedings regarding the determination of the defendant's competency to stand trial.

C. In determining the issue of the defendant's competency to stand trial, the court may utilize any of the procedures established by K.S.A. 22-3302, as amended.

D. If the defendant is found to be incompetent to stand trial, the procedures established by K.S.A. 22-3303, as amended, are to be followed.

E. See O'Connor v. Donaldson, 422 U.S. 563; Drope v. Missouri, 420 U.S. 162; Jackson v. Indiana, 406 U.S. 715.

X. DIVERSION
(K.S.A. 22-2906 to 22-2912)

Diversion means referral of a defendant in a criminal case to a supervised performance program prior to adjudication. After a complaint has been filed and prior to conviction, if it appears to the district attorney that diversion would be in the interests of justice and of benefit to the defendant and the community, the district attorney, after considering factors listed in K.S.A. 22-2908, may propose a diversion agreement to the defendant. The terms of each diversion agreement shall be established by the district attorney who shall adopt written policies and guidelines for the diversion program. Each criminal defendant shall be informed in writing of such policies and guidelines. No criminal defendant shall be required to enter a plea as a condition of diversion. Defendant shall be present at all proceedings and have the right to be represented by counsel.

A diversion agreement shall provide that if the defendant fulfills the obligation of the program, as determined by the district attorney, the district attorney shall dismiss the criminal charges with prejudice. If the district court finds on request of the district attorney that the defendant has failed to fulfill the specific terms of the diversion agreement, the criminal proceedings shall be resumed. The agreement shall include waiver of constitutional and statutory rights of the defendant to speedy arraignment, preliminary examination, and speedy trial, and in DWI cases defendant is required to stipulate to the evidence and waive jury trial. The provisions of K.S.A. 22-2906 to 22-2911 shall be inapplicable (except K.S.A. 22-2908) if the district court adopts its own rules for diversion pursuant to K.S.A. 20-342.

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E. REBUTTAL
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1. Length
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CRIMINAL - TRIAL

I. PRELIMINARY MATTERS

A. MOTION TO SUPPRESS INVOLUNTARY CONFESSION OR ADMISSION

See the Criminal Before-Trial chapter for information regarding this motion.

B. MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

See the Criminal Before-Trial chapter for information regarding this motion.

II. THE JURY

A. PREPARATION FOR VOIR DIRE

Swear the jury panel for the voir dire examination, then explain to the panel the nature of the case and the general order of trial. State the offense charged, the identity of the alleged victim, the date and place of the crime charged, and the fact that the defendant pleads not guilty. Presumption of innocence should be explained at this time. Then introduce counsel, identify the defendant, and explain the burden of proof.

B. VOIR DIRE

1. Purpose

The purpose of voir dire is to determine that prospective jurors are qualified pursuant to law, and free from bias,

prejudice, or partiality. The trial judge, therefore, has an affirmative duty to see that a fair and impartial jury is selected.

2. Conducting the Examination

The right of the parties to conduct the examination is more restricted than in civil cases but reasonable latitude should be allowed counsel to determine competence and lack of bias. K. S. A. 22-3408.

3. Scope and Contents of Questions

In general, any question is proper if reasonably designed to test a prospective juror's ability to judge fairly and impartially. The examination may cover a prospective juror's legal qualifications, the existence of grounds for mandatory excuse set out in K.S.A. 43-158, the existence of grounds for permissible excuse set out at K.S.A. 43-159(e), or the existence of conditions which can be a basis for a challenge for cause. See K.S.A. 22-3410.

Determinations regarding K.S.A. 43-159(c) and (d) should be made prior to voir dire and counsel should not be permitted to examine prospective jurors with regard to those matters.

Counsel may ask a prospective juror if he or she has had former jury service and, if so, whether it was for a criminal or civil trial and whether the prospective juror understands that different burdens of proof exist depending on whether the case is civil or criminal, and whether a

verdict was reached at that other trial. Counsel may not inquire about the nature of the verdict.

Counsel may ask about a prospective juror's position on the constitutional rights of the defendant, such as the presumption of innocence, burden of proof, and right to remain silent but counsel may not define these rights for the prospective juror.

The judge should require that general questions be asked whenever appropriate, to prevent unnecessary delay. Questions that serve no useful purpose, that are designed to sway jurors to one party's side, or that are argumentative in nature should not be permitted.

4. Objections

Objections to questions may be sustained if the question would tend to indoctrinate the prospective jury on a theory of the case, instruct the jury on a matter of law, extract promises, pledges, or personal favor from the jury, or create bias. Objections may also be sustained if the question is irrelevant or repetitive.

The trial judge should presume that counsel's motive for asking a particular question or making an objection is valid. In ruling on objections, the judge should avoid any caustic manner, tone of voice, or remarks. If no objection is made to a question the judge believes improper, the judge has a duty to state that the question need not be answered. Counsel should not be allowed to make objections for the purpose of disrupting questioning or interjecting argument.

5. Challenges for Cause

Statutory grounds for challenges for cause are set out at K.S.A. 22-3410. A judge has inherent power to try challenges for cause on other grounds. State v. Stuart, 206 Kan. 11.

Challenges for cause are exercised during voir dire examination. All challenges for cause must be made before the jury is sworn to try the case.

All challenges for cause are tried by the court. The judge may ask additional questions to satisfy himself or herself that grounds to excuse a juror for cause actually exist.

6. Peremptory Challenges

The classification of the crime charged determines the number of peremptory challenges each party will be allowed. See K.S.A. 22-3412.

For any felony trial, the prosecution or the defense, by request, can require that a sufficient number of prospective jurors be qualified so that enough remain after challenges for cause to permit each side to exercise all of its peremptory challenges while leaving 12 jurors to be sworn to try the case. K.S.A. 22-3411a. (State v. Mitchell), 234 Kan. 185)

If the foregoing procedure is not required, an alternative method is to allow examination of prospective jurors until 12 have qualified and have not been excused for cause. Then permit each side to exercise alternately a peremptory challenge and replace the challenged prospective

juror immediately. Often the parties will find no need to use all of the peremptory challenges and will, therefore, waive the others. Using this method, counsel will know, at all times, the composition of the prospective jury.

C. ATTACHMENT OF JEOPARDY

Jeopardy attaches when the jury has been sworn. It is not necessary that an opening statement have been made or that a witness have been called. Cox v. State, 205 Kan. 867; State v. Stiff, 117 Kan. 243.

It may be advisable, therefore, to delay swearing the jury even though the jury already has been selected if the trial will not begin until the following day or until some other time. If any unexpected event occurs during the interim that might keep the trial from getting underway, such as the unavailability of a material witness, jeopardy would not have attached and the court could dismiss the jury and select another at a later time. Ordinarily, there is no need to delay swearing the jury.

D. ALTERNATE JURORS

See K.S.A. 22-3412(3).

The need for alternate jurors is determined by the expected length of the trial, conflicts with holidays or court dockets, conditions of health, and any other circumstances that might arise that would require a second trial if there were no alternate jurors.

E. ADMONITION UPON SEPARATION

Whenever jurors are permitted to separate before the completion of the judicial proceeding they should be admonished not to converse with any person on any subject related to the trial nor to form or express any opinion regarding the trial. See K.S.A. 22-3420.

III. THE TRIAL

A. OPENING STATEMENTS

1. Instructions to the Jury

Immediately prior to the opening statements, the judge should tell the jury that the state's attorney will disclose the facts the state alleges, the witnesses who will be called, and the expected substance of their testimony. The judge should also inform the jury that the attorney for the defendant can make an opening statement after the state's opening statement or immediately prior to offering the defense's evidence. The jury must be instructed that no part of the opening statements may be considered as evidence.

2. The State's Opening Statement

The prosecuting attorney should relate the facts the state alleges and identify the witnesses who will be called along with each witness's expected testimony. The prosecution may read the information, indictment, or complaint but may not argue the state's case, bring up matters irrelevant to the crime charged, or contravene rulings made at a pretrial hearing.

3. The Defense's Opening Statement

Whether made after the state's opening statement or immediately prior to offering defense evidence, the defense's opening statement should relate the facts the defense alleges, identify defense witnesses, and the expected testimony to be given each witness. Counsel may not argue the defense's case, bring up matters irrelevant to the crime charged, or contravene rulings made at a pretrial hearing.

B. OPTIONAL INSTRUCTIONS TO THE JURY

After the opening statements the judge may instruct the jury on any matters that will assist the jury in considering the evidence.

C. THE STATE'S CASE IN CHIEF

1. Witnesses

Neither separation of witnesses nor exclusion of a witness from the courtroom when not testifying is required by statute. (K.S.A. 22-2903 applies only to the preliminary examination.) Either may be required by the judge as a matter of discretion. The judge should separate witnesses who will testify to the contents of the same conversation, the circumstances regarding the same event, or the identity of the same person.

As a general rule, witnesses are limited to those listed in the information, indictment, or complaint. The state may move at any time, however, to endorse

additional witnesses on the information, indictment, or complaint. The motion should be granted if there is no prejudicial surprise to the defendant, if sufficient time is allowed defense counsel to ascertain the substance of the additional witness's testimony, and if the state shows adequate reason why the name of the proposed witness did not appear originally on the information, indictment, or complaint.

If the court finds that a witness is unavailable, the witness's prior testimony given under oath at the preliminary hearing or an earlier trial and transcribed may be used by either side. The proponent of the testimony has a burden to show that the witness is unavailable and that, where applicable, the proponent made a reasonable effort to obtain attendance of the witness. K.S.A. 60-459(g) defines "unavailable as a witness." A person charged with a crime arising out of the same circumstances would be unavailable as a witness under K.S.A. 60-459(g)(2).

Use of a witness's deposition is governed by K.S.A. 22-3211 and reference to this statute is imperative where use of a deposition as evidence is desired by either party. See also State v. Goodman, 207 Kan. 155, and State v. Hill, 211 Kan. 287.

Witnesses must remain in attendance until released, even if they have already testified. The judge may require a witness to return at another time or a later date and the witness is bound by any such requirement.

K.S.A. 22-4201 et seq. provides a procedure to secure attendance of out-of-state witnesses from states that have adopted an identical procedure. If the other state has not adopted such a procedure, witnesses from that other state cannot be compelled to attend.

Attendance of a witness confined in a penal institution of another state can be secured under the procedure set out at K.S.A. 22-4207 et seq. if the other state also has adopted this uniform procedure.

2. Evidence - Special Considerations

a. Evidence of a Prejudicial Nature

All motions to suppress evidence on the grounds that the evidence is allegedly offered for the sole purpose of prejudicing the jury should be made and ruled on prior to trial, preferably at a pretrial conference.

b. K.S.A. 60-455 (Evidence of Other Crimes or Civil Wrongs)

1) The supreme court has taken a very restrictive stance with regard to the admission of other crimes evidence under K.S.A. 60-455 and such evidence is not to be admitted without a good, sound reason. A trial court should exercise great caution, therefore, before deciding to admit evidence of other crimes or civil wrongs under that statute. All such decisions should be made at a pretrial conference. See State v. Bly, 215 Kan. 168 Resolving this matter at a pretrial conference also will preclude the necessity for a K.S.A. 60-445 determination.

2) Subject to K.S.A. 60-447, evidence that a person committed a crime or civil wrong on a specified occasion may not be admitted to prove the person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion. Inclination, propensity to commit crime or civil wrong, tendency, attitude, and anything else that means the same as "disposition" may not be proven by such evidence.

3) Subject to K.S.A. 60-445 and 60-448, evidence that a person committed a crime or civil wrong on a specified occasion should be admitted under K.S.A. 60-455 only if all the admissibility tests are passed and if relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or absence of accident. At the pre-trial hearing, the proponent must specify which of these facts the other crimes evidence is purportedly relevant to prove. Which material fact or facts, if any, that the other crimes evidence is relevant to prove will be determined, however, solely by the trial court.

4) Other crimes evidence may be admissible independently of K.S.A. 60-455.

a) If the defendant introduces evidence of good character the state, during cross-examination or on rebuttal, may introduce evidence of prior crimes to show bad character.

b) If the commission of another crime constitutes a part of the events leading up to the commission of the crime charged, evidence of the other crime is admissible to show the relationship of the parties and the defendant's actions just prior to the crime charged.

c) If the other crime is an element of the offense charged, evidence of the other crime may be admitted.

NOTE: There may be authority to admit, under other statutes or in accordance with pertinent case law, evidence of other crimes or civil wrongs for other purposes and in other situations.

c. Physical Exhibits

1) Identification

Before it can be offered into evidence, a physical object must be (a) identified by a witness who has personal knowledge regarding the object and (b) marked as a numbered or lettered exhibit. Generally, the prosecution's exhibits are numbered and the defense exhibits are lettered.

2) Test of Admissibility

To be admissible in a criminal trial, a physical exhibit must be (a) relevant to the guilt or innocence of the defendant or to any element of the crime charged or to a special defense alleged (such as alibi) and (b) identified by a witness who has personal knowledge regarding the exhibit.

3) Objections to the Introduction of a Physical Exhibit

Objections to the introduction of a physical exhibit into evidence may be sustained by the judge if the objecting party alleges as grounds for the objection and the judge finds that the physical exhibit (a) lacks proper foundation from the witness through whom it is offered; (b) is not relevant to any issue in the case; (c) is inflammatory to such an extent that its evidentiary value is thereby outweighed; (d) is cumulative to the point of prejudicing the jury; (e) was not revealed to the defense subsequent to a court order granting discovery pursuant to K.S.A. 22-3212 (see K.S.A. 22-3212(7)); or (f) tends to support a special defense not pled, such as alibi or insanity. Any other sound reason specified by the objecting party may suffice as a basis for sustaining an objection to the introduction of a physical exhibit.

Prior to an attorney's determination whether he or she will object to the introduction of a physical exhibit, the attorney should be permitted to examine an identifying witness's actual knowledge

of an exhibit, if the attorney so requests. The attorney should not be permitted, however, to cross-examine the witness nor to engage in re-direct examination.

4) Use of Physical Exhibits

Once in evidence, exhibits may be used by either side for the purpose of interrogating any subsequent witness and the jury may use the physical exhibits during its deliberations. The judge has discretion to allow counsel to use the physical exhibits outside the courtroom for legitimate reasons during the trial or while an appeal is pending.

5) Custody and Disposition

If the defendant is convicted, all physical exhibits that were offered, or admitted into evidence during the trial, should be retained by the court until any appeal has been denied or until the time in which to take an appeal has expired. (This time is 130 days after imposition of sentence. See K.S.A. 22-3608 and 21-4603, as amended.) See also S.Ct. Rule 182.

Seized property admitted into evidence should be disposed of in accordance with K.S.A. 22-2512, as amended.

D. THE DEFENDANT'S CASE IN CHIEF

1. Opening Statement

If the defendant's attorney has reserved his or her opening statement, the attorney may proceed with the statement at this point in the trial. If, however,

no defense evidence will be presented, no opening statement is permitted at this point. Making an opening statement is not required before defense evidence may be presented nor is the defense required to present evidence even though an opening statement was made immediately subsequent to the state's opening statement.

2. Witnesses - Special Considerations

As a matter of judicial discretion, a complaining witness, or a law enforcement officer whose name as a prosecution witness is endorsed on the complaint, information, or indictment, may be called by the defense and asked leading questions without a formal showing of hostility. This discretion does not extend to other witnesses.

A codefendant not then on trial may be called by the defendant only if, outside the presence of the jury and in the presence of his or her attorney, the codefendant is advised of and understands the privilege against self-incrimination and is informed that there is no compulsion to testify. A record to this effect must be made by the judge. A codefendant may not be called to overcome an objection to testimony, given by another witness, regarding statements made by the codefendant.

A prisoner in the custody of the secretary of corrections may be a witness at a criminal trial only upon order of and under conditions imposed by the trial judge. K.S.A. 22-3416.

E. REBUTTAL

Only evidence, not repetitious of previously introduced evidence, that tends to contradict or impeach evidence offered in the defendant's case in chief may be presented by the state in rebuttal. The state must comply with K.S.A. 22-3218(2) before calling a witness to rebut defense evidence as to alibi.

F. SURREBUTTAL

Only evidence, not repetitious of previously introduced evidence, that tends to contradict or impeach evidence offered in the state's rebuttal may be presented by the defense in surrebuttal.

G. INSTRUCTIONS TO JURY

The judge must instruct the jury before argument begins.

Both the state and the defense may submit written requested instructions which must be filed as part of the record if the case. If submitted, each requested instruction must be accepted, modified, or rejected by the judge. The judge must permit counsel to object to instructions outside the presence of and before the instructions are given to the jury. The reporter must record all objections made and the judge's rulings on the objections. All instructions given must be filed as a part of the record of the case. K.S.A. 22-3414(3).
See PIK 51.01 et seq.

H. FINAL ARGUMENT

1. Length

The judge determines the amount of time to be allowed final argument. This determination is made at the conclusion of the hearing on the objections to the jury instructions and after the judge has considered the length of the trial, number of witnesses that were called, the number of defendants, the elements of the crime charged, and the nature of the various defenses.

2. Scope

Comment may not be made on facts not in evidence. Statements that may inflame the passions of or otherwise prejudice the jury may not be made nor may abusive language be used. Counsel may not express a personal belief regarding the merits of the case or a personal opinion regarding the guilt or innocence of the defendant. S. Ct. Rule 225, DR 7-106. See also ABA Prosecution Function Standard 5.8 and Defense Function Standard 7.8.

3. Judge's Duty to Restrict

The judge should order stricken and should admonish the jury to disregard any statement or remark exceeding the permissible scope of final argument, regardless of whether any objection has been made by counsel. State v. Gutekunst, 24 Kan. 252.

To avoid any error that could be injected into the trial via the closing argument the judge should take time prior to argument to admonish or instruct the jury on the scope of final argument and the procedure to be utilized to ensure that the scope is not exceeded.

CRIMINAL - AFTER TRIAL

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- B. MOTION FOR NEW TRIAL
- C. MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE

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- A. PRESENTENCE INVESTIGATION
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CRIMINAL - AFTER TRIAL

I. PROCEDURE UPON ACQUITTAL

Upon a jury verdict or court finding of not guilty, the defendant is entitled to immediate discharge from custody. K.S.A. 22-3424. If the defendant is acquitted because he or she was insane at the time of the commission of the alleged crime, the defendant must be committed to the state security hospital for safekeeping and treatment. K.S.A. 22-3428, as amended.

Upon discharge of the defendant after acquittal, the sureties are relieved from further liability on the bond. A cash deposit given pursuant to K.S.A. 22-2802, as amended, is subject to immediate refund to the person who made the deposit.

II. POST-TRIAL MOTIONS

A. MOTION FOR ARREST OF JUDGMENT (K.S.A. 22-3502)

If, on its own motion or on motion of a defendant, the court finds that the complaint, information, or indictment does not charge a crime or that the court was without jurisdiction, it must arrest the judgment of guilt. The motion must be made within 10 days after the verdict or finding of guilty, or after a plea of guilty or nolo contendere. During the 10 day period, the court may grant additional time in which to file the motion. An arrest of judgment discharges the defendant from all liability for the charge.

B. MOTION FOR NEW TRIAL (K.S.A. 22-3501)

The court, on motion of a defendant, may grant a new trial if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant may vacate the judgment, if it has been entered, take additional testimony and direct the entry of a new judgment.

If the motion is based on the grounds of newly discovered evidence, it may be made at any time within two years after final judgment, but if an appeal is pending the motion may be granted only on remand. If the motion is based on other grounds, it must be filed within 10 days after the verdict or finding of guilty. During the 10 day period, the court may grant additional time in which to file the motion.

C. MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE (K.S.A. 60-1507)

See the Habeas Corpus section of the Miscellaneous chapter.

III. PRESENTENCE AND SENTENCING

A. PRESENTENCE INVESTIGATION

As of January 1, 1979, whenever a defendant is convicted of a misdemeanor, the court before whom the defendant was convicted has the discretion to request a presentence investigation by a probation officer.

As of January 1, 1979, whenever a defendant is convicted of a felony, the court must order a presentence investigation

which is to be conducted by a probation officer or in accordance with K.S.A. 21-4603, as amended, unless the court finds that adequate and current information is available in a previous presentence investigation or from other sources. K.S.A. 21-4604, as amended. If ordered by the court, the presentence investigation must include a physical and mental examination of the defendant.

As of January 1, 1979, if the court finds that an adequate presentence investigation cannot be conducted by resources available within the judicial district, including mental health centers and mental health clinics, the court may require that a presentence investigation be conducted by the Kansas State Reception and Diagnostic Center or by the state security hospital. K.S.A. 21-4603, as amended.

If a presentence investigation is conducted by a probation officer, the trial judge may commit the defendant to a state hospital or to any suitable local mental health facility for a mental examination, evaluation, and report. If the defendant will assume the expense, the court may commit the defendant to an adequate private hospital for these purposes. A defendant may not be committed for these purposes for more than 120 days. K.S.A. 22-3429.

If the report of a mental examination of the defendant shows that the defendant is in need of psychiatric care and treatment, that such care and treatment would materially aid in the defendant's rehabilitation, and that neither the

defendant nor society is likely to be endangered by permitting the defendant to undergo psychiatric care and treatment in lieu of incarceration, the judge may commit the defendant to any state or county facility which provides treatment for mentally ill persons. The defendant may be committed to such facility until further order of the court, or until discharged by the institution's chief medical officer but not longer than the maximum terms of incarceration provided for the crime the defendant was convicted of. At the time of the commitment, the trial judge must make an order imposing liability for the cost of the care and treatment. The defendant may appeal the order of commitment. If the institution's chief medical officer finds that the defendant is not dangerous to himself, herself, or others and that further treatment will not be of benefit to the defendant, the defendant must be returned to the court to be sentenced, committed, granted probation, or discharged in the court's discretion. K.S.A. 22-3429, 22-3430, 22-3431.

Pending completion of a presentence investigation and appearance for disposition, the defendant may be released on bond. See K.S.A. 22-2804, as amended.

A copy of the presentence report should be made available to the prosecutor or the defendant's attorney if either requests a copy.

B. DISPOSITION OF A GUILTY DEFENDANT

1. General Considerations

As soon as the post-trial motions are determined and the presentence investigation is completed, disposition must be made without unreasonable delay. Sentence may be imposed only in open court, K.S.A. 22-3424, with the defendant personally present if the crime was a felony or personally present or represented by counsel if the crime was a misdemeanor.

Before imposing sentence the defendant's counsel may speak on behalf of the defendant, and the court must ask the defendant if the defendant wants to make a statement on his or her own behalf or to present evidence in mitigation of punishment. K.S.A. 22-3424.

Then, before pronouncing sentence, the court must inform the defendant of the verdict or finding of guilty and must ask the defendant whether there is any legal cause why judgment should not be rendered (allocution). If no legal cause is shown the court must pronounce judgment. K.S.A. 22-3422.

2. Authorized Dispositions (K.S.A. 21-4603, as amended)

As of January 1, 1979, the court may

a. Commit a convicted defendant to the custody of the secretary of corrections for service of a sentence of imprisonment imposed. If the sentence is for confinement for a term less than one year, the defendant must be committed to jail rather than to the custody of the secretary of corrections. As of January 1, 1979, female offenders may be committed to

the custody of the secretary of corrections only if sentenced to a term of imprisonment for a felony. See K.S.A. 75-5229, as amended;

b. Impose the fine applicable to the offense. (See K.S.A. 21-4503);

c. Release the defendant on probation subject to such conditions as the court deems appropriate including orders requiring full or partial restitution;

d. Suspend the imposition of sentence subject to such conditions as the court deems appropriate including orders requiring full or partial restitution; or

e. Impose any appropriate combination of the authorized dispositions listed above.

When a defendant is released on probation or suspended sentence the court must order payment of reparations or restitution to the aggrieved party and determine the amount and manner of payment. The court may order reimbursement to the state of funds expended for counsel for an indigent defendant as a condition of probation or suspended sentence. K.S.A. 21-4610(3) and (4).

3. Sentences of Imprisonment or Confinement

In determining the minimum portion of an indeterminate sentence, the criteria established by K.S.A. 21-4606 must be utilized.

K.S.A. 21-4501, as amended and as effective January 1, 1979 requires the court, when imposing a sentence of imprisonment for a class B, C, D, or E felony, to fix the maximum portion of the indeterminate term of imprisonment authorized for those classes of felonies.

If two or more sentences are imposed on the same date the court may direct that they run consecutively or concurrently. In the absence of any direction, the term will run concurrently. K.S.A. 21-4608.

As of January 1, 1979 when a defendant to be sentenced by a Kansas court, is under sentence of a federal court or of a court of another state or is subject to sentenc in a federal court or in a court of another state for an offense committed prior to the defendant's being sentenced by the Kansas court, the Kansas court may direct that the custody of the defendant be relinquished to federal authorities or to the authorities of the other state and that the sentence imposed by the Kansas court run concurrently with any federal sentence imposed or with any sentence imposed by another state. K.S.A. 21-4608 as amended.

As of January 1, 1979 K.S.A. 21-4620, as amended, requires a court to state in the order of commitment to the custody of the secretary of corrections the reasons for imposing the particular sentence. In addition, whenever a defendant has been convicted of a class A, B, or C felony by reason of aiding, abetting, advising or counseling another to commit a crime or b

reason of the principle set out at K.S.A. 21-3205(2), the court will have to state this fact in the order of commitment.

Within 120 days after a sentence is imposed or within 120 days after probation has been revoked, the court may modify a sentence by directing that a less severe penalty be imposed within statutory limits. If an appeal was taken, the sentence may be modified within 120 days after receipt of the mandate from the appellate court.

The court may reduce the minimum term originally imposed anytime before it has run if the reduction is recommended by the secretary of corrections, the court finds that the best interests of the public will not be jeopardized and that the welfare of the prisoner will be served. The recommendation of the secretary of corrections and the order of reduction must be made in open court. The minimum term may be reduced below the statutory limit. K.S.A. 21-4603, as amended.

After imposing sentence in a case which was tried after a plea of not guilty, the court must advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to appeal in forma pauperis. K.S.A. 22-3424. The defendant also should be advised of the right to counsel and the right to a transcript of the proceedings without cost. If the defendant wants to appeal, defendant's attorney should prepare and file a notice of appeal on behalf of the defendant.

The court may correct an illegal sentence at any time. The defendant must receive full credit for time spent in custody. Before correcting a sentence, the court must hold a hearing on the matter at which the defendant should be present personally and have the assistance of counsel. K.S.A. 22-3504.

4. Fines

In determining the amount of any fine imposed the court must consider K.S.A. 21-4503 and 21-4607.

5. Probation and Suspension of Imposition of Sentence

The term of probation of suspension of imposition of sentence may not exceed five years in felony cases or two years in misdemeanor cases unless renewed or extended. The total period of probation of suspension of imposition of sentence for a felony may not exceed the greatest maximum term provided by law for the crime unless the crime the defendant is convicted of is nonsupport of a child (K.S.A. 21-3605). In that event, the period may be renewed or extended for the length of the period of responsibility for child support. K.S.A. 21-4611, as amended.

If the probationer or person under suspension of imposition of sentence violates any of the conditions imposed, the court may issue a bench warrant for the arrest of the person, or may issue a notice to appear to answer to a charge that a condition was violated.

(Probation officers also have statutory authority to arrest or to have such person arrested.) A person detained for a violation of the conditions of probation or suspension of imposition of sentence may be released pending a hearing and must be given a hearing in open court without unnecessary delay. At the hearing, the person is entitled to be represented by counsel (if indigent, to have counsel appointed) and to present evidence. If it is proved by the state to the satisfaction of the court that as condition was violated, the court may continue or revoke probation or suspension of imposition of sentence, may require the sentence or any lesser sentence to be served, or may impose sentence if its imposition was suspended.
K.S.A. 22-3716.

Probation or suspension of imposition of sentence may be terminated by the court at any time. Upon such termination or upon termination by expiration of the term of probation or suspension of imposition of sentence, the court must enter an order to this effect.
K.S.A. 21-4611, as amended.

A probationer may not have his probation revoked unless it is made to appear that the probationer has failed to comply with the terms and conditions of probation. Swope v. Musser, 223 Kan. 133.

6. Record of Judgment

When judgment is rendered or a sentence of imprisonment is imposed, a record must be made upon the journal of the court stating (a) the crime charged and the pertinent criminal statute; (b) the plea, verdict,

or finding, the judgment rendered, the sentence imposed, and the statute under which the sentence was imposed; and (c) that the defendant was duly represented by counsel and giving the name of the attorney, or that the defendant in writing stated that counsel was not wanted. K.S.A. 22-3426.

If the defendant is sentenced to imprisonment or confinement, the commencement date of the sentence must be designated by the court. The commencement date must be established so as to give the defendant credit for all time the defendant spent in jail pending disposition. K.S.A. 21-4614.

If the sentence is increased because the person previously had been convicted of one or more felonies, the record must contain a listing of each such previous conviction showing the date of the prior conviction, the court in which the person was convicted, and the crime the person was convicted of, and giving a summary of the evidence upon which the finding of the conviction was based. K.S.A. 22-3426. The record of previous convictions should show that the person was represented by counsel at all stages of the proceedings leading to the previous convictions. In setting an increased sentence, the court should consider the implications of K.S.A. 22-3717, as effective January 1, 1979 and K.S.A. 75-5201 et seq., as effective January 1, 1979 and the relevant administrative regulations.

If the sentence is imposed under the mandatory sentencing statute (K.S.A. 21-4618), the judgment should so state.

IV. APPELLATE REVIEW AS OF RIGHT AND RELEASE PENDING APPEAL

A. APPELLATE REVIEW BY THE DISTRICT COURT

1. Appeals by the Defendant

A defendant may appeal as of right to a district judge or an associate district judge from any judgment of a district magistrate judge. K.S.A. 22-3609a.

A defendant may appeal as of right to the district court from any judgment of a municipal court which adjudges the defendant guilty of a violation of the ordinances of the municipality. K.S.A. 22-3609, as amended.

In either case, (a) the appeal must be taken within 10 days after the date of the judgment appealed from; (b) the case is heard and determined on the original complaint; (c) the trial is de novo; and (d) further proceedings on the judgment appealed from are stayed. If the complaint is defective, the court may order that a new complaint be filed and may proceed as if the original complaint had been adequate.

If upon appeal to the district court the defendant is convicted, the district court must render judgment against the defendant for all costs of the case, both in the district court and the municipal court. The court must also impose sentence upon the defendant. K.S.A. 22-3611.

2. Appeals by the Prosecution

The prosecution may appeal as of right to a district judge or an associate district judge (a) from an order dismissing a complaint, information, or indictment; (b) from an order arresting judgment; or (c) upon a question reserved by the prosecution. K.S.A. 22-3602, as amended.

B. APPELLATE REVIEW BY THE APPELLATE COURTS

1. Appeals by the Defendant

An appeal to the appellate court having jurisdiction of the appeal may be taken by the defendant as of right from any judgment against the defendant in the district court, except that the defendant may not appeal from a judgment of conviction rendered by a district judge or associate district judge upon a plea of guilty or nolo contendere. K.S.A. 22-3602, as amended. The defendant may, however, appeal the sentence imposed on a plea of guilty or nolo contendere. State v. Green, 233 Kan. 1007.

2. Appeals by the Prosecution

An appeal to the supreme court from cases before a district judge or associate district judge may be taken by the prosecution as of right (a) from an order dismissing a complaint, information, or indictment; (b) from an order arresting judgment; or (c) upon a question reserved by the prosecution. K.S.A. 22-3602, as amended.

C. RELEASE OF THE DEFENDANT PENDING APPEAL

1. Appeals by the Defendant

a. Appeals to the District Court

A person who has been convicted of a crime before a district magistrate judge or who has been convicted in a municipal court of the violation of a city ordinance may apply, upon taking an appeal to a district judge or associate district judge, to be released pending the determination of the appeal. If the application is made before the case has been referred to the administrative judge for assignment, the conditions of release are to be determined by the district magistrate judge or the municipal court judge from whom the appeal is taken. If the application is made thereafter, the administrative judge, or the district judge or associate district judge to whom the case has been assigned shall determine the conditions of release. Any appearance bond required must be deposited in the court where it is fixed. K.S.A. 22-3609, as amended; 12-4601; 12-4602; 22-2804(3), as amended.

b. Appeals to the Appellate Courts (K.S.A. 22-2804, as amended)

A person who has been convicted of a crime and has filed a notice of appeal to the supreme court or court of appeals must make his or her application to be released to the court whose judgment is appealed from or to any judge of that court.

If an application to such court or judge has been made and denied or action on th application did not afford the applicant the relief to which the applicant believ himself or herself entitled, the applica may make an application for release to t appellate court.

In either case, any appearance bond must be filed in the court from which the appeal is taken.

2. Appeals by the Prosecution

The defendant may not be held in jail no subject to an appearance bond during the pendency of an appeal by the prosecution K.S.A. 22-3604.

V. EXPUNGEMENT OF RECORDS OF CONVICTION (K.S.A. 21-4619)

A. GENERAL RULE

1. Convicting Court's Duty to Inform

Whenever a person is convicted of a crim such person must be informed of the ability to expunge such conviction. Thi duty is not affected by the type or form of sentence.

2. When Records May be Expunged

a. The Three Year Rule

A person convicted of a Class D or Class E felony or a misdemeanor may petition the convicting court for expungement of the records of convic tion if three or more years have elapsed since such person:

1. satisfied the sentence imposed, or

2. was discharged from probation, parole, suspended sentence, or conditional release.

b. The Five Year Rule

A person convicted of a class A, class B or class C felony, or an offense enumerated in K.S.A. 21-4619(b), may petition the convicting court for expungement of the records of conviction if five or more years have elapsed since such person:

1. satisfied the sentence imposed, or

2. was discharged from probation, parole, suspended sentence, or conditional release.

B. PROCEDURE

1. The Petition

The petition must state the petitioner's full name at time of filing, and full name at time of arrest and conviction if different, sex, race, date of birth, date of conviction, crime convicted of, and identity of the convicting court.

2. Docket Fee

No docket fee is charged for filing a petition for expungement in district court, and all such petitions are docketed in the original criminal action.

3. Notice

When a petition for expungement is filed the court must set a date for a hearing and give the prosecuting attorney notice.

4. Hearing and Evidence

Any person who may have relevant information about the petitioner may testify at the hearing. The court shall have access to any reports or records of the Secretary of Corrections or Adult Authority relating to petitioner.

5. Findings

The court must order the petitioner's conviction expunged if the court finds:

a. That petitioner has not been convicted of a felony in the past two years and no proceeding involving a felony is pending or being instituted against petitione

b. That circumstances and behavior of petitioner warrant the expungement

c. The expungement is consistent with the public welfare.

C. THE EXPUNGEMENT ORDER

1. Contents

The expungement order must contain the same information that is required to be contained in the petition. The court may also specify in the order any other

circumstances under which the conviction is to be disclosed in addition to those listed in the expungement statute.

2. To Whom Sent

The clerk must send a certified copy of the expungement order to the FBI, the KBI, the Secretary of Corrections, and to any other criminal justice agency that may have a record of conviction.

D. SUBSEQUENT USE OF EXPUNGED RECORDS

Even though the records of a conviction have been expunged they may nevertheless be released by the custodian thereof and considered by:

1. Courts

Any court when determining the sentence to be imposed for a subsequent conviction.

2. Law Enforcement and Private Security Agencies

Any criminal justice agency, private detective agency, or private patrol operator if the former petitioner makes application to them for employment.

3. Secretary of SRS - (or designee)

In order to obtain information relating to employment in an institution of the department of SRS as defined in K.S.A. 76-12a01, of any person whose record has been expunged.

4. Authorities Responsible for Admission to the Kansas Bar

The Supreme Court, its clerk or disciplinary administrator, the State Board for Admission, and the State Board for Discipline of attorneys, when in conjunction with an application for admission or reinstatement to the practice of law by a person whose record has been expunged.

For expungement of violations of city ordinances see K.S.A. 12-4516.

CONTENTS OF MISCELLANEOUS CHAPTER

ADOPTION

This section is reserved for a future chapter. See K.S.A. 1983 Supp. 38-113a, K.S.A. 59-2102 and K.S.A. 59-2218. Also, see In re Estate of Barnes, 212 Kan. 505 and Weaver v. Frazee, 219 Kan. 42.

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"O money, money, money, I'm not
necessarily one of those who
think thee holy,

But I often stop to wonder how thou
canst go out so fast when thou
comest in so slowly."

Hymn To The Thing That Makes
The Wolf Go - By Ogden Nash
(1903-1971)

ATTORNEYS' FEES

I. PRELIMINARY CONSIDERATIONS

(Note that the statutes authorizing attorney's fees that are cited in this chapter do not comprise an exclusive list. Only the most frequently used statutes have been cited.)

A. AUTHORITY TO AWARD ATTORNEYS' FEES

Specific statutory authorization is required before noncontractual attorneys' fees can be awarded in state judicial proceedings.

B. FACTORS TO BE CONSIDERED IN SETTING THE AMOUNT OF "REASONABLE ATTORNEYS' FEES"

The amount of attorneys' fees awarded should be equal to the value of the services rendered a client by the attorney, Barnes v. Mid-Continent Casualty Co., 192 Kan. 401, 405, and this value is determined by the trial court.

In setting the value of these services the trial court should consider the following:

1. The time and labor required and the extent of service rendered.

2. The nature and importance of the litigation and the novelty and difficulty of the questions involved.

3. The responsibility imposed on counsel.

4. The skill required to perform the legal services properly.

5. The results obtained and the amount of money or the value of the property involved.

6. Time limitations imposed by the client or by circumstances.

7. The nature and length of the professional relationship between the client and the attorney.

8. The experience, reputation, and ability of the attorney.

Barnes v. Mid-Continent Casualty Co., 192 Kan. 401. See also S. Ct. Rule 225, D.R. 2-106.

C. EFFECT OF ATTORNEY-CLIENT CONTINGENT FEE AGREEMENT ON COURT'S DISCRETION TO DETERMINE AMOUNT OF ATTORNEYS' FEES

A trial court may not consider an existing contingent fee contract as an element in determining the amount of attorneys' fee to be awarded. Wolf v. Mutual Benefit Health & Accident Association, 188 Kan. 694, 714. The only exception to this rule appears to be that if a condemnor appeals an award of court appointed appraisers and the jury renders a verdict for the landowner in an amount greater than the appraisers' award, the court, after deciding to allow attorneys' fees under K.S.A. 26-509, may consider an existing contingent fee contract in determining the amount of attorneys' fees to be awarded. City of Wichita v. Chapman, 214 Kan. 575, 587.

II. SPECIFIC STATUTORY AUTHORITY FOR AWARDING ATTORNEYS' FEES

A. SCOPE OF SUMMARY

The following summary of statutory authori for awarding attorneys' fees is limited to those state statutes used most frequently. It should be noted that there are numerous other Kansas statutes, not summarized here that require or permit an award of attorne fees.

B. STATUTES REQUIRING AWARD OF ATTORNEYS' FEES

1. Automobiles: Personal Injury and Property Damage

a. Automobile Injury Reparations Act (K.S.A. 40-3113a[e])

If a PIP insured, or his or her depen- dent or personal representative, pur- sues a remedy in accordance with the requirements of K.S.A. 40-3117, as amended, against a tortfeasor who caused the injury for which personal injury protection benefits are payable the court must apportion attorneys' fees between the insurer or self-insur and the injured person or his or her dependent or personal representative, in amounts to be fixed by the court. The amount to be paid by each is a matter of judicial discretion.

b. Negligent Operation of a Motor Vehicle (K.S.A. 60-2006, as amende

The court is required to award reason- able attorneys' fees in any action brought for the recovery of damages

of less than $3,000 sustained and caused by the negligent operation of a motor vehicle to the prevailing party unless that party recovers no damages or a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered. This applies to actions brought under chapter 60 and chapter 61. See Stafford v. Karmann, 2 Kan.App.2d 248.

2. Fences (K.S.A. 29-303 and 29-310)

The court must award reasonable attorneys' fees to a prevailing party in an action to recover moneys expended to repair or rebuild a fence as authorized by K.S.A. 29-303, that was not repaired or rebuilt by the other party as ordered by the fence viewers.

The court must award reasonable attorneys' fees to a prevailing party in an action to recover moneys expended to complete that portion of a fence, that would allow accupation in severalty of land originally enclosed in common with other land but without a partition fence, that the other party had responsibility but neglected to complete. K.S.A. 29-310.

3. Insurance

a. Unjust Refusal to Pay Loss of Insured (K.S.A. 40-256)

If the court finds from the evidence that an insurer refused without just cause or excuse to pay the full amount of the plaintiff-insured's

loss, the court must award the plaintiff reasonable attorneys' fees for services in the action including proceedings on appeal. No attorneys' fees can be awarded, however, if the insurer made a tender before commencement of the action, and the amount recovered in the action is not in excess of the amount tendered. Under this statute, the policy of insurance is not limited as to type nor as to the nature of the loss. See State, ex rel., v. Masterson, 221 Kan. 540.

b. Recovery Under Certain Casualty Insurance Policies (K.S.A. 40-908)

The court must award reasonable attorneys' fees to a plaintiff who obtained a judgment against an insurance company on a policy insuring against loss by fire, tornado, lightning, or hail if the amount of the judgment exceeds any tender made by the insurance company before commencement of the action.

4. Oil, Gas, or Other Mineral Lease (K.S.A. 55-202)

The court must award reasonable attorneys' fees in an action by the landowner to obtain from the leaseholder a release of the forfeited release of record.

5. Partition (K.S.A. 60-1003(c)(5))

In actions to partition personal or real property, or an estate or interest created by an oil, gas, or other mineral

lease, or an oil or gas royalty, the court is required to tax, as costs, attorneys' fees and expenses and to apportion such fees and expenses among the parties according to their respective interests.

6. Probate

a. Counsel for Conservatee or Ward (K.S.A. 59-3032)

The court must award reasonable attorneys' fees and expenses to appointed counsel for a ward, proposed ward, conservatee, or proposed conservatee.

b. Fiduciaries (K.S.A. 59-1717)

The court must award to a fiduciary, reasonable fees charged the fiduciary by the fiduciary's attorneys. See Jennings v. Murdock, 220 Kan. 182, 214, and In re Estate of Murdock, 213 Kan. 837.

c. Wills: Proceedings to Admit or Oppose Admission of a Will to Probate (K.S.A. 59-1504)

The court must award reasonable attorneys' fees to any person, whether successful or not, named in a will or codicil who defends the will or codicil or who prosecutes any proceeding in good faith and with just cause for the purpose of having the will or codicil admitted to probate. Reasonable attorneys' fees must also be awarded to any other person who successfully opposes

the probate of any will or codicil. The award is paid from the assets of the decedent's estate. cf. Murdock v. First National Bank, 220 Kan. 459; In re Estate of Davis, 171 Kan. 605.

7. Real Estate

a. Real Estate Recovery Revolving Fund (K.S.A. 58-3025)

The court must award reasonable attorneys' fees to a successful claimant against the real estate recovery revolving fund, in an action to recover an unsatisfied portion of a judgment against a real estate broker or salesman, if the recovery is $500 or less. Reasonable attorneys' fees are paid from the fund.

b. Marketable Record Title Act (K.S.A. 58-3410

The court must award attorneys' fees to the plaintiff in a quiet title action if the court finds that the defendant filed, for the purpose of slandering title to land, the notice of land interest claim permitted by K.S.A. 58-3406.

8. Securities (K.S.A. 17-1268)

The court must award reasonable attorneys' fees to a successful plaintiff in an action to recover the consideration paid for a security that was sold by the defendant in violation of K.S.A. 17-1254 or 17-1255, or sold in the manner described by K.S.A. 17-1268(a).

9. Small Claims (K.S.A. 61-2709)

If the appellee prevails on an appeal, the court shall award appellee, as part of the costs, reasonable attorneys' fees incurred by the appellee on the appeal. See also Miscellaneous Chapter, Small Claims, sec. IV.C.

10. Summary Judgment (K.S.A. 60-256[g])

If summary judgment affidavits are presented in bad faith or solely for the purpose of delay, the court must order the party who submitted the affidavit to pay reasonable attorneys' fees to the other party.

11. Worker's Compensation

a. Suits Against the Negligent Person (K.S.A. 44-504, as amended)

The court must fix and apportion reasonable attorneys' fees among an employer and the injured employee or his or her dependent or personal representative in an action for damages against a third party, not in the same employ as the injured or deceased worker at the time of the injury, who is legally liable for the injury to or death of the worker.

b. Suit for the Collection of Past Due Disability or Medical Compensation (K.S.A. 44-512a, as amended)

The court must award reasonable attorneys' fees to a plaintiff in a proper action to to collect past due disability or medical compensation.

12. Wrongful Death (K.S.A. 60-1905)

If there has been a recovery in a wrongful death action, the court must award reasonable attorneys' fees to the attorneys for the plaintiff in accordance with the services performed by the attorney. This award is to be deducted from the amount recovered. The amount remaining after deduction of attorneys' fees is the amount that can be distributed to the heirs who suffered a lo

C. STATUTES PERMITTING AWARD OF ATTORNEYS' FEES

1. Automobile Injury Reparations Act

a. Discovery Relation to Injured Person (K.S.A. 40-3114, as amende

In order to protect against annoyance harassment, embarassment, or oppression, the court may allow reasonable attorneys' fees for the appearance of attorneys at discovery proceedings permitted by an order of the court in accordance with K.S.A. 40-3114, as amended.

b. Frivolous Law Suits (K.S.A. 40-3111, as amended)

The court may award reasonable attorneys' fees, based upon actual time expended, of the insurer or self-insurer for defense of a fraudulent, excessive, or frivolous claim against it. The attorneys' fees awarded may be treated as an offset against any benefits due or to become due to the claimant. See also, section II.C.7. on page 140.

c. PIP benefits Overdue
(K.S.A. 40-3111, as amended)

In an action for overdue personal injury protection benefits, the court may order attorneys' fees of the plaintiff to be paid by the insurer or self-insurer, in addition to the benefits recovered, if the court finds that the insurer or self-insurer unreasonable refused to pay the claim or unreasonably delayed proper payment.

2. Consumer Protection Act
(K.S.A. 50-634[e])

In a consumer action pursuant to K.S.A. 50-634(a), (c), or (d), the court may award to the prevailing party reasonable attorneys' fees if the action has been terminated by a judgment, or settled, and a non-prevailing defendant-supplier committed an act or practice that violated the consumer protection act or a non-prevailing plaintiff-consumer brought or maintained the action knowing that it was groundless.

3. Discovery (K.S.A. 60-237)

If a deponent or a party unjustifiably frustrates discovery, the court may require the deponent or party, the party's attorney, or both, to pay reasonable attorneys' fees to the party desiring discovery. See and K.S.A. 60-237(a)(4), (b)(2), (c), and (d).

4. Divorce; Annulment; Separate Maintenance

a. Interlocutory Orders
(K.S.A. 60-1607, as amended)

After a petition for divorce, annulmen or separate maintenance has been filed the court, upon motion, may make any provisions for attorneys' fees that will insure to either party efficient preparation for the trial of the case.

b. The Decree
(K.S.A. 60-1610, as amended)

The court may include an order in the decree of divorce, annulment, or separate maintenance awarding attorneys' fees to either party as is just and equitable.

5. Wills and Intestate Succession

a. Proceedings for the Benefit of the Ultimate Recipients of the Estate (K.S.A. 59-1504)

The court may award attorneys' fees to any heir at law or beneficiary under a will who, in good faith and for good cause, successfully prosecutes or defends any other action for the benefit of the ultimate recipients of the estate.

b. Proceedings to Construe a Will

In a meritorious action brought to construe a will or the provisions of a will concerning a trust, the court may allow attorneys' fees under K.S.A. 59-1504, Baldwin v. Hambleton, 196 Kan. 353, 361; Central Trust Co. v. Harris. 152 Kan. 296, if the action is reasonably necessary and benefits the estate or trust. Attorneys' fees may not be awarded if the action is to enforce a claim against the estate.

Reznik v. McKee, Trustee,
216 Kan. 659, 681-682.

6. Worker's Compensation Fund
(K.S.A. 44-566a, as amended)

The court may award attorneys' fees to the Worker's Compensation Fund by assessing the party who impleaded the fund, if it is determined that the fund is not liable under K.S.A. 44-566a(e). K.S.A. 44-566a(f).

7. Frivolous Law Suits
(K.S.A. 60-2007, as amended)

If the court finds that a party has asserted in a pleading, motion or response thereto, a claim or defense, including setoffs and counterclaims, or has denied the truth of a factual statement recited in a pleading or during discovery, without a reasonable basis in fact for doing so, and not in good faith, the court shall assess against the party, as additional costs, and allow to the other party reasonable attorneys fees and expenses incurred by the other party as a result of such claim, defense, or denial.

III. STATUTORY LIMITATIONS OF ATTORNEYS' FEES IN CERTAIN SITUATIONS

A. CLAIMS FOR EMPLOYMENT SECURITY LAW BENEFITS (K.S.A. 44-718[b], as amended)

A court may not assess attorneys' fees against a person claiming benefits under the Employment Security Law.

B. DAMAGE ACTIONS AGAINST HEALTH CARE PROVIDERS (K.S.A. 7-121b)

The attorneys' fees to be paid by each litigant in an action for damages against

a health care provider must be approved by the judge prior to final disposition of the case by the district court. In determining whether to approve the attorneys' fees the judge must consider the nature and difficulty of the issues involved and the time reasonably necessary to prepare and present the case. Other factors which may be considered are listed at the beginning of this section.

C. WORKER'S COMPENSATION (K.S.A. 44-536)

Attorneys' fees for services rendered in connection with the securing of compensation, under an initial or original claim, may not exceed 25% of the amount of compensation recovered and paid, and must be fixed by a written contract between the attorney and the employee or the employee's dependents.

NOTE: This does not apply to a suit to collect past due compensation. See paragraph II.B., above.

IV. STATUTORY PROHIBITIONS AGAINST CONTRACTING FOR ATTORNEYS' FEES

A. CONSUMER CREDIT TRANSACTIONS (K.S.A. 16a-2-507)

A provision in a consumer credit transaction agreement requiring payment by the consumer of attorneys' fees is unenforceable.

B. NOTES; BONDS; MORTGAGES; OTHER EVIDENCE OF INDEBTEDNESS (K.S.A. 58-2312)

A provision in a note, bond, mortgate, or other evidence of indebtedness regarding the payment of attorneys' fees is void.

C. FIXING ATTORNEYS' FEES (K.S.A. 50-112)

Arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to fix attorneys' fees are void.

CHILD CUSTODY

The uniform child custody jurisdiction act (L. 1978, Ch. 231, §§1-26) as enacted in Kansas during the 1978 session of the Legislature will become effective January 1, 1979.

As of that date, all child custody determinations (including orders relating to visitation) must be made in accordance with this uniform act. A court's right to make awards of support, however, is not affected by the act.

The following statutes have been amended to conform to the requirements of the uniform act:

K.S.A. 1977 Supp. 38-820
K.S.A. 1977 Supp. 60-1604
K.S.A. 60-1605, 60-1610, 60-1611

NOTE: This new act requires a thorough study by members of the bench and bar.

CLASS ACTIONS

I. APPLICABLE STATUTE; FEDERAL RULE

II. SETTLEMENT OR DISMISSAL OF A CLASS ACTION

III. SCOPE OF CERTIFICATION HEARING

IV. CASE LAW

A. IN GENERAL
B. SELECTED CASES

CLASS ACTIONS

I. APPLICABLE STATUTE; FEDERAL RULE

K.S.A. 60-223 is patterned after and similar but not identical to Rule 23 of the Federal Rules of Civil Procedure (FRCP). Some parts of the statute not identical in language to the corresponding part of the federal rule are identical in substance. Some parts of the statute differ in substance from the federal rule. Hence, in any action commenced as a class action, continued reference to the text of K.S.A. 60-223 is imperative.

NOTE: K.S.A. 60-223a and 60-223b are related statutes that provide special rules for certain kinds of class actions. They are similar to FRCP 23.1 and 23.2.

II. SETTLEMENT OR DISMISSAL OF A CLASS ACTION

Notwithstanding anything in K.S.A. 60-241(a that appears to be or suggests the contrary no class action may be settled or dismissed without the approval of the court, even if the settlement or dismissal would occur prior to certification. The initial pleadi denominates the action a class action and it must be dealt with as such unless not certified as a class action.

III. SCOPE OF CERTIFICATION HEARING

A. A hearing to determine whether or not an action may be maintained as a class action must be held prior to a determination on the merits. K.S.A. 60-223(c)(1). See the Manual for Complex Litigation.

B. The issue to be determined at the hearing is whether all the prerequisites to a class action (see K.S.A. 60-223(a)) and at least one of the requirements for maintenance of a class action (see K.S.A. 60-223(b)) have been met. In resolving this issue, the character and type of the class representative's claim must be examined and then compared with those of the class sought to be represented. This must be done without a determination on the merits.

After comparing the claims of the representative with the claims of the putative class and before the action may be certified as a class action, the judge must find that:

1. The class is so numerous that joinder of all members is impracticable; and

2. There are questions of law or fact common to the class; and

3. The claims or defenses of the representative are typical of the claims or defenses of the class; and

4. The representative will fairly and adequately protect the interests of the class.

In addition the judge must find:

1. The prosecution of separate actions by or against individual members of the class would create (a) a risk of inconsistent or varying adjudications with regard

to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, (b) a risk of adjudications with regard to individual members of the class which, as a practical matter, would be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or has refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with regard to the class as a whole; or

3. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available procedures for the fair and efficient adjudication of the controversy. See K.S.A. 60-223(b)(3).

C. A judge's determination and order that an action may or may not be maintained as a class action may be conditional and may be altered or amended before a decision on the merits. The order denying or granting class certification is not a final order and appealable as a matter or right regardless of the amount of any plaintiffs indi-

vidual claim. Coopers and Lybrand v. Livesay, 437 U.S. 463, 57 L.Ed.2d 351, 98 S.Ct. 2454. K.S.A. 60-233(c)(1). Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 57 L.Ed.2d 364, 98 S.Ct. 2451.

D. The cost of notice to the class must be borne by the plaintiff unless the defendant is able to do so with less difficulty or expense. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 57 L.Ed.2d 253, 98 S.Ct. 2380.

IV. CASE LAW

A. IN GENERAL

Kansas appellate courts give great weight to federal decisions construing FRCP 23. Therefore, if a particular issue involving the class action procedure established by K.S.A. 60-223 is not resolved by existing state case law, federal case law may aid its resolution.

Publications which can assist in locating the federal case law are as follows:

1. The Federal Rules Service (F.R.S.) contains the full text of all federal court decisions construing FRCP 23. Headnotes accompany the text of the decisions.

2. The Federal Rules Decisions (F.R.D.) contains the full text of federal district court decisions construing FRCP 23. It does not contain any U.S. Supreme Court or Court of Appeals decisions.

3. The United States Code Annotated (U.S.C.A.) has a compilation of annotations of FRCP 23 decisions in the pertinent Title 28 rules volume.

4. Two monographs that are periodically updated are Class Actions 1976: The Basics, Practicing Law Institute, New York: 1976; and Class Actions: In the Wake of Eisen III and IV, American Bar Association Section of Litigation, Chicago: 1977.

B. SELECTED CASES

Selected cases relevant to specific aspects of the class actions procedure are as follows:

1. Prerequisites (K.S.A. 60-223[a])

a. Numerosity

Peterson v. Oklahoma City Housing Authority, 545 F.2d 1270 (10th Cir. 1976).

b. Typicality

Winters v. Kansas Hospital Service Association, Inc., 1 Kan.App.2d 64 (1977).

East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977).

Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977).

Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975).

Rich v. Martin Marietta Corporation, 522 F.2d 333 (10th Cir. 1975).

Doctor v. Seaboard Coast Line R. Company, 540 F.2d 699 (4th Cir. 1976).

White v. Gates Rubber Company, 53 F.R.D. 412, 415 (D. Colo. 1971).

c. Adequacy of the Class Representative

Connolly v. Frobenius, 2 Kan.App.2d 18 (1978).

Albertson's Inc. v. Amalgamated Sugar Company, 503 F.2d 459 (10th Cir. 1974).

2. Additional Requirement for Maintenance of a Class Action

a. Sufficiency of Injunctive or Declaratory Relief

Rich v. Martin Marietta Corporation, 522 F.2d 333 (10th Cir. 1975).

3. Procedural Problems

a. Certification Decision Required before a Decision on the Merits

Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977).

b. Notice and Res Judicata

Shutts, Executor v. Phillips Petroleum Company, 222 Kan. 527 (1977).

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

c. Appealability of Class Action Certification Decision

Coopers and Lybrand v. Livesay, 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454.

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 57 L. Ed. 2d 364, 98 S. Ct. 2451

K.S.A. 60-223(c)(1).

Lamphere v. Brown University, 553 F. 2d 714 (1st Cir. 1977).

Gay v. Waiters' and Dairy Lunchmen's Union, 549 F. 2d 1330 (9th Cir. 1977).

4. The Class Representative's Source of Funds

Sanderson v. Winner, 507 F. 2d 477 (10th Cir. 1974).

CONTEMPT OF COURT

I. PRELIMINARY CONSIDERATIONS

II. DEFINITIONS

III. PERSONS SUBJECT TO THE COURT'S CONTEMPT POWER

IV. PROCEDURE; WHEN BENCH WARRANTS MAY ISSUE

V. SANCTIONS

- A. FINES
- B. INCARCERATION
  - 1. Civil Contempt
  - 2. Criminal Contempt
    - a. Direct
    - b. Indirect

VI. COSTS

VII. APPEAL

CONTEMPT OF COURT

I. PRELIMINARY CONSIDERATIONS

Contempt of court proceedings are employed to enforce a court's order that something be done or not be done for the benefit or advantage of a party litigant, to uphold the respect for and authority of a court, or to punish conduct tending to obstruct or that obstructs the administration of justice.

Certain conduct, by statute, is or may be contempt of court. See e.g., K.S.A. 60-237(b)(1) and (b)(2)(D) (failure of a deponent to be sworn or to answer questions; failure to obey a discovery order); K.S.A. 60-256(g) (filing summary judgment affidavits in bad faith or solely for the purpose of delay); K.S.A. 60-803 (disobedience of any judgment in mandamus); K.S.A. 60-909 (disobedience of any restraining order or injunction).

Case law, too, has held certain conduct to be contempt. See e.g., Swope v. State, 145 Kan. 928 (refusal of an expert witness to testify because he had not been specially paid for his professional opinion); State v. Gendusa, 122 Kan. 520 (use of inappropriate language on the witness stand); In re Hanson, 80 Kan. 783 (refusal of a witness to answer proper questions); State v. Anders, 64 Kan. 742 (disobedience of a subpoena to attend court as a witness).

Regardless of whether contemptuous conduct has been designated as such, by statute or case law, prudence always must be exercised when invoking contempt of court powers.

II. DEFINITIONS

"Bench warrant" is a warrant issued by a judge commanding the sheriff or some other person appointed by the court to bring a named person before the court to be tried for contempt of court. A writ of attachment is a bench warrant.

"Direct contempt" is contempt of court committed during the sitting and in the presence of a court or of a judge at chambers. K.S.A. 20-1202. See In re Sanborn, 208 Kan. 4.

"Indirect contempt" is contempt of court committed under circumstances not constituting direct contempt. K.S.A. 20-1202. Examples are: failure to make court ordered support payments; failure to comply with a court order granting a writ of habeas corpus; failure to comply with a court ordered injunction; failure to comply with a court's discovery or restraining order.

"Civil contempt" is the failure to do something ordered by a court to be done for the benefit or advantage of another party to a proceeding. It is the disobedience of a court order or decree made on behalf of a litigant. Hendrix v. Consolidated Van Lines, Inc., 176 Kan. 101.

"Criminal contempt" is conduct which impugns the dignity and authority of a court, or of a judge acting officially, or conduct that obstructs or tends to obstruct the administration of justice. In re Sanborn, 208 Kan. 4.

NOTE: The dividing line between civil and criminal contempt is indistinct. Conduct falling within the definition of civil contempt should be treated only as civil contempt. To determine when a bench warrant may be issued, the crucial distinction is whether the contempt is direct or indirect - not whether it is civil or criminal.

It should be noted further that the categories "direct or indirect" and "civil and criminal" are not mutually exclusive.

III. PERSONS SUBJECT TO THE COURT'S CONTEMPT POWER

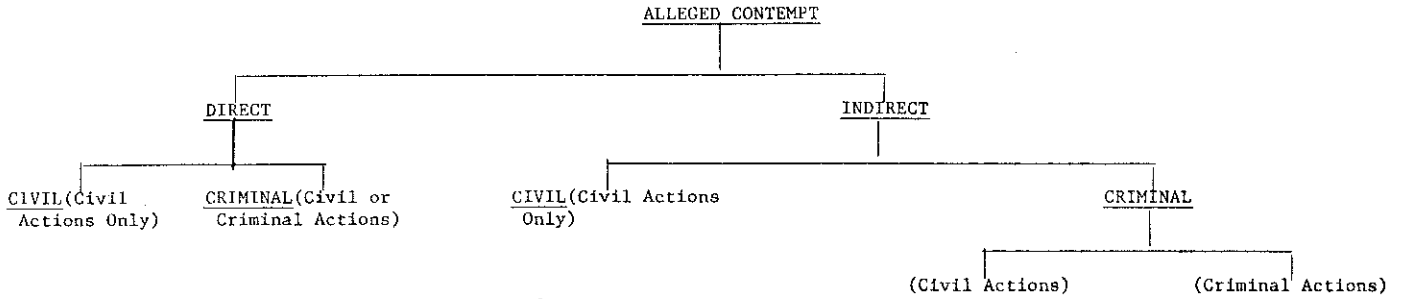
Generally, any person who interferes with or obstructs the administration of justice or who impugns the dignity and authority of the court is subject to the court's contempt power. Any person who disobeys an order of the court is also subject to these powers.

Parties, attorneys, media representatives, witnesses, jurors, and persons observing a trial are some of the persons subject to the court's contempt powers.

State v. Poindexter, 225 Kan. 431, 435; 590 P.2d 1074 (1979).

IV. PROCEDURE: WHEN BENCH WARRANT MAY ISSUE

The following chart shows at what point in the contempt proceedings a bench warrant may issue:


ALLEGED CONTEMPT
DIRECT
INDIRECT
CIVIL(Civil Actions Only)
CRIMINAL(Civil or Criminal Actions)
CIVIL(Civil Actions Only)
CRIMINAL
(Civil Actions)
(Criminal Actions)
*1. If needed, a bench warrant may be issued immediately by the judge.
2. Once the accused is before the court, punishment may be imposed summarily. No written affidavit, or accusation need be made.
3. If the accused is found guilty, the judgment must specify the conduct constituting the contempt and the defenses or extenuating circumstances offered by the contemnor. The judgment must be entered of record.
1. Motion for order to appear and show cause why the accused should not be held in contempt.
Affidavit setting forth the facts constituting the alleged contempt to accompany motion.
*(If the affidavit alleges physical abuse in violation of the court's restraining order issued pursuant to K.S.A. 60-1607(a)(2), as amended, the court may immediately issue a bench warrant.)
2. Court order issues.
3. Sheriff or other person appointed by the court serves the accused with the order.
1. Motion for order to appear and show cause why the accused should not be held in contempt.
(The motion may be made by any person who has knowledge of the alleged contempt. The judge, on his or her own motion, may cause the motion and affidavit to be filed.)
Affidavit setting forth the facts constituting the alleged contempt to accompany motion.
2. Court order issues.
3. Sheriff or other person appointed by the court serves the accused with the order.
1. No statutory procedure exists.
2. The procedure for indirect, criminal contempt arising out of civil actions should be used.

4. If the accused appears at the time specified, the court may delay the trial of the issue of contempt so that the accused can purge himself or herself of the contempt, or may proceed to try the issue of contempt and punish the accused if found guilty.

*5. If the accused does not appear after proper service of the order, or if the accused is secreting himself or herself to avoid the process of the court, a bench warrant may issue.

6. Once the accused is before the court, the court may make such orders as the court deems proper concerning the release of the accused pending the trial. The court may delay trial of the issue of contempt so that the accused can purge himself or herself of the contempt, or may proceed to try the issue of contempt and punish the accused if found guilty.

4. If the accused appears at the time specified, the court may delay the trial of the issue of contempt so that the accused can purge himself or herself of the contempt or may proceed to try the issue of contempt and punish the accused if found guilty.

*5. If the accused does not appear after proper service of the order, or if the accused is secreting himself or herself to avoid the process of the court, a bench warrant may issue.

6. Once the accused is before the court, the court may make such orders as the court deems proper concerning the release of the accused pending the trial. The court may delay trial of the issue of contempt so that the accused can purge himself or herself of the contempt, or may proceed to try the issue of contempt and punish the accused if found guilty.

Direct contempt and indirect criminal contempt proceedings may be initiated by the judge. Indirect civil contempt proceedings may be initiated by an adverse party.

A district judge may request the attorney general to furnish the court with a special prosecutor to prosecute contempt proceedings. K.S.A. 20-1206, as amended.

At the trial, the alleged contemnor is presumed innocent. Guilt must be proven beyond a reasonable doubt. See Gompers v. Buck's Stove & R. Co., 221 U.S. 418.

V. SANCTIONS

Sanctions for civil contempt are to be remedial and, therefore, may be coercive in nature. Sanctions for criminal contempt are punitive.

If a person is found guilty of contempt, a fine may be imposed, incarceration may be ordered, and costs may be charged to the contemnor.

A. FINES

Fines are subject to constitutional prohibitions against excessive fines. See Ks. Const. Bill of Rights, §9.

B. INCARCERATION

1. Civil Contempt

The contemnor may not be sentenced for a fixed period. If incarceration is ordered, the period of time of incarceration should

be made conditional on the contemnor's compliance with the violated order. Goetz v. Goetz, 181 Kan. 128.

NOTE: Nonpayment of a debt cannot be contempt unless the accused is financially able to pay the debt and refuses to do so. See Wohlfort v. Wohlfort, 116 Kan. 154; In re Burrows, 33 Kan. 675.

2. Criminal Contempt

An order of incarceration for criminal contempt is subject to constitutional prohibitions against cruel and unusual punishment.

a. Direct

Incarceration may be ordered without a separate trial and without affording the accused all required due process rights only if (1) the misconduct occurred in open court and was actually observed by the judge, (2) the misconduct interrupted the court's business, and (3) immediate punishment is essential to prevent degradation of the court's authority. See In re Oliver, 333 U.S. 257, 275. Incarceration, if ordered without a separate trial and without affording the accused all required due process rights, should be ordered only for a definite period of time less than six months.

All due process rights probably must be afforded an accused if incarceration for a period of six months or more is ordered. Any such period of incarceration may be for a definite period of time only.

When the court does not act at the time the contempt is committed, and the conduct of the contemnor consists of personal villification or attacks the integrity of the judge, the judge should recuse himself and another judge should determine the charge. Mayberry v. Pennsylvania, 400 U.S. 455, 465, 27 L.Ed.2d 532, 91 S.Ct. 499 (1971). State v. Poindexter, 225 Kan. 431, 435 (1979).

b. Indirect

Incarceration may be ordered only after a separate trial in which the accused has been afforded the same due process rights that are required in criminal proceedings. The only exception to this is that a jury trial is not required if the court, at the commencement of the trial, announces an intention to order no incarceration in excess of six months, and no such incarceration is actually ordered. See Duncan v. Louisiana, 391 U.S. 145.

VI. COSTS

Costs of the contempt proceedings may be assessed against the contemnor.

II. APPEAL

A. A finding of guilty may be appealed. K.S.A. 20-1205.

A finding of not guilty of criminal contempt may not be appealed. Hendrix v. Consolidated Van Lines, Inc., 176 Kan. 101.

A finding of not guilty of civil contempt may be appealed. Hendrix v. Consolidated Van Lines, Inc., 176 Kan. 101.

B. Any judgment of conviction may be reviewed upon the direct appeal to or by writ of error from the supreme court.

Upon allowance of an appeal or writ of error, execution of the judgment must be stayed upon the giving of such bond as may be required by the court or by any justice of the supreme court.

CONTROL OF THE COURTROOM

I. DUTY OF THE JUDGE TO CONTROL THE COURTROOM

II. POWER TO CONTROL THE COURTROOM; LIMITATIONS

III. PERSONS OVER WHOM CONTROL MAY BE EXERCISED

IV. METHODS OF CONTROL

A. CIVIL ACTIONS

1. Order to Cease the Disruptive Conduct
2. Removal From the Courtroom or Courthouse Premises
3. Contempt of Court
4. Involuntary Dismissal

B. CRIMINAL ACTIONS

1. Order to Cease the Disruptive Conduct
2. Removal from the Courtroom or Courthouse Premises
3. Contempt of Court

V. COMPORTMENT OF THE JUDGE WHILE EXERCISING POWER TO CONTROL THE COURTROOM

CONTROL OF THE COURTROOM

I. DUTY OF THE JUDGE TO CONTROL THE COURTROOM

A judge has a duty to prevent and to halt any disturbance or disruption of a trial. See Illinois v. Allen, 397 U.S. 337, 343 (1970).

II. POWER TO CONTROL THE COURTROOM; LIMITATIONS

A judge has discretion to make any orders or rulings reasonably designed to prevent or halt disruptive behavior.

A judge should order the least restrictive method of control necessary to prevent or halt the disruptive behavior. Before deciding to utilize a particular method of control, a judge should consider the risk of further disruption, and any delay of trial or jury prejudice that a particular method of control might cause.

A judge's power to control the courtroom is limited by the constitutional rights of the persons over whom control is to be exercised. These rights include the right to a fair trial and the right to a free press, as well as other constitutional rights.

III. PERSONS OVER WHOM CONTROL MAY BE EXERCISED

A judge may exercise control over any person in the courtroom or on the courthouse premises whose actions are

disturbing or disrupting the trial. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966); Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

IV. METHODS OF CONTROL

Before the trial commences, the judge should identify and explain any rules of conduct which must be followed that are not otherwise prescribed by statute or court rule. See Illinois v. Allen, 397 U.S. 337 (1970); Mayberry v. Pennsylvania, 400 U.S. 455 (1971).

A. CIVIL ACTIONS

1. Order to Cease the Disruptive Conduct

Any person whose actions are disturbing or disrupting the trial should be ordered to cease the disruptive conduct and should be allowed a reasonable amount of time to do so.

2. Removal from the Courtroom or Courthouse Premises

Any person whose actions are disturbing or disrupting the trial may be removed from the courtroom or required to leave the courthouse premises.

3. Contempt of Court

Contempt of court proceedings may be initiated against any person whose actions disturb or disrupt the trial to the extent that the action obstructs or

tends to obstruct the administration of justice or impugns the dignity and authority of the court. See the Contempt of Court section in the Miscellaneous chapter for the sanctions which may be imposed.

4. Involuntary Dismissal

If the plaintiff or the plaintiff's attorney has been ordered but has failed to discontinue conduct that has disturbed or disrupted the trial, the judge may order the defendant to move, pursuant to K.S.A. 60-241(b), for an involuntary dismissal of the action, and the judge may rule on any such motion in accordance with that statute.

B. CRIMINAL ACTIONS

1. Order to Cease the Disruptive Conduct

Any person whose actions are disturbing or disrupting the trial should be ordered to cease the disruptive conduct and should be allowed a reasonable amount of time to do so. See Illinois v. Allen, 397 U.S. 337 (1970).

2. Removal from the Courtroom or Courthouse Premises

a. Removal of the Defendant

The judge should warn an obstreperous defendant that he or she will be removed from the courtroom if the disruptive behavior is not discontinued. If the defendant does not cease the disruptive conduct within a reasonable amount of time he or she may be removed

from the courtroom. Counsel for the defendant must be present during any period of time the defendant is so absent. The defendant must be readmitted upon his or her promise to refrain from the disruptive behavior. See Illinois v. Allen, 397 U.S. 337 (1970).

b. Removal of Others

Any other person whose actions are disturbing or disrupting the trial may be removed from the courtroom or required to leave the courthouse premises. See Sheppard v. Maxwell, 384 U.S. 333 (1966). See also the Fair Trial and Free Press section of the Miscellaneous chapter.

3. Contempt of Court

Contempt of Court proceedings may be initiated against any person whose actions disturb or disrupt the trial to the extent that the action obstructs or tends to obstruct the administration of justice or impugns the dignity and authority of the court. See the Contempt of Court section of the Miscellaneous chapter for the sanctions which may be imposed.

NOTE: Although binding and gagging an obstreperous defendant is constitutionally permissible, such method of control should not be used.

V. COMPORTMENT OF THE JUDGE WHILE EXERCISING POWER TO CONTROL THE COURTROOM

In exercising power to control the courtroom, a judge must make impartial rulings in a firm, dignified, and restrained manner. A judge should be in control of his or her temper and emotions, and should not engage in repartee. A judge should not make disparaging comments about any person.

The relevant portions of S.Ct. Rule 601 are applicable. See also Illinois v. Allen, 397 U.S. 337 (1970); and A.B.A. Function of the Trial Judge Standard 6.3 and 6.4.

"Wedlock, indeed, hath oft compared been
To public feasts, where meet a public rout --
Where they that are without would fain go in,
And they that are within would fain go out."

Sir John Davies (1569-1626)
Contention Betwixt A Wife, etc.

IX. THE DECREE

A. PRELIMINARY CONSIDERATIONS
B. CARE OF MINOR CHILDREN
C. DIVISION OF PROPERTY
D. MAINTENANCE
E. SEPARATION AGREEMENTS
F. RESTORATION OF NAME
G. EFFECTIVE DATE OF THE DECREE

X. COSTS AND FEES

XI. REMARRIAGE

XII. DECREES OF OTHER STATES

XIII. ASSIGNMENTS

XIV. VISITATION

This section is limited to matters treated in Article 16 of Chapter 60 of the Kansas Statutes Annotated.

I. DEFINITIONS

"Annulment" is a judicial pronouncement that a marriage was void from the beginning.
Johnson County National Bank v. Bach, 189 Kan. 291.

"Divorce" is a judicial dissolution of a statutory or common law marriage.

"Separate Maintenance" is a judicial decree that one spouse may live apart from the other spouse while having a right to support from the other spouse in amounts determined by the court. A separate maintenance decree does not dissolve the marriage.
Childers v. Childers, 210 Kan. 105.

II. PRELIMINARY CONSIDERATIONS

A. RESIDENCY REQUIREMENTS

1. Divorce (K.S.A. 60-1603)

Either party must have actually resided in Kansas for the 60 days immediately preceding the date the petition is filed.

For purposes of this residency requiremen a spouse's residence is his or her actual residence and is determined without reference to the other spouse's residence

2. Annulment; Separate Maintenance

There are no residency requirements for either of these actions.

B. VENUE

Actions for divorce, annulment, or separate maintenance may be brought in the county (1) in which the petitioner is an actual resident at the time the petition is filed, or (2) where the respondent resides, or (3) where the respondent may be served. K.S.A. 60-607.

Any county is proper venue for these actions if the respondent enters a voluntary general appearance in the action. K.S.A. 60-304(h).

Any person who has been a resident of or stationed at a United States post or military reservation within Kansas for the 60 days immediately preceding the date the petition is filed may file an action for divorce in any county adjacent to such post or military reservation. K.S.A. 60-1603.

III. GROUNDS FOR DIVORCE, ANNULMENT, OR SEPARATE MAINTENANCE

A. DIVORCE; SEPARATE MAINTENANCE (K.S.A. 60-1601, 60-1619)

The court shall grant a decree of divorce or separate maintenance for any of the following reasons:

1. Incompatibility. See Williams v. Williams, 219 Kan. 303; North v. North, 217 Kan. 213; Berry v. Berry, 215 Kan. 47.

2. Failure to perform a material marital duty or obligation.

3. Institutional confinement for mental illness for a period of two years, which need not be continuous, or an adjudication of mental illness or mental incapacity while a spouse is confined for mental illness. See the pertinent conditions and further requirements of K.S.A. 60-1601(b).

   An action for separate maintenance may also be maintained on the ground of desertion for 90 consecutive days. See K.S.A. 60-1619.

B. ANNULMENT (K.S.A. 60-1602)

The court shall grant a decree of annulment if:

1. The marriage is void for any reason.

2. The contract of marriage is voidable because it was induced by fraud.

3. The court may grant a decree of annulment if the contract of marriage was induced by a mistake of fact, lack of knowledge of a material fact or any other reason justifying rescission of a contract of marriage.

IV. JURISDICTION AND PLEADINGS

A. ACQUIRING JURISDICTION OVER NONRESIDENT AND DIFFICULT-TO-SERVE RESIDENTS

If the respondent does not reside in Kansas or, if the petitioner with due diligence is unable to serve the summons in Kansas, the summons and the petition may be served by publication. K.S.A. 60-307(a)(1). If the respondent does not appear after being served by publication, the court has in rem jurisdiction and may proceed accordingly.

If personal service of process is made on the respondent outside the state of Kansas, the court has in personam jurisdiction over the respondent if (1) the respondent and the petitioner ever lived in Kansas while married to each other and (2) petitioner continues to reside in Kansas. The court has jurisdiction as to all obligations involving maintenance, child support and custody, visitation rights, and property settlement under Article 16 of Chapter 60 of the Kansas Statutes Annotated. K.S.A. 60-308(b)(8).
See Varney v. Varney, 222 Kan. 700.

B. PLEADINGS

1. Captions

All pleadings are to be captioned "In the matter of the marriage of _____ and _____." The name of the petitioner is to appear first and the name of the respondent second, but the parties are not to be designated as such in the caption.

2. The Petition

The petition must (a) be verified by the petitioner in person or by the guardian of an incapacitated person; (b) state the names and dates of birth of any minor children of the marriage; and (c) allege, in language as similar to the language of K.S.A. 60-1601 or 60-1602 as possible and without a detailed statement of facts, the grounds for the divorce, annulment, or separate maintenance. When there are minor children of the marriage, the petition must contain or must be accompanied by an affidavit which contains the information required by the uniform child custody jurisdiction act. K.S.A. 60-1604.

If a petition for annulment is based on fraud or mistake, the circumstances constituting the fraud or mistake must be specifically pleaded. See K.S.A. 60-209(b

3. The Answer

If new matter is alleged in the answer, it must be verified by the respondent in person or by the guardian of an incapacitated person. When there are minor children of the marriage, the answer must contain or must be accompanied by an affidavit which contains the information required by the uniform child custody jurisdiction act K.S.A. 60-1605.

4. The Counterpetition

The respondent may file a counterpetition for divorce, annulment, or separate maintenance. A counterpetition must be verified by the respondent in person or by the guardian of an incapacitated person and

must allege, in language as similar to the language of K.S.A. 60-1601 or 60-1602 as possible and without a detailed statement of facts, the grounds for the divorce, annulment [except, see K.S.A. 60-209(b)], or separate maintenance. The names and dates of birth of any minor children of the marriage must be stated in the counterpetition.

When there are minor children of the marriage, the counterpetition must contain or must be accompanied by an affidavit which contains the information required by the uniform child custody jurisdiction act.

5. The Bill of Particulars

Requests for a bill of particulars and destruction of the bill of particulars are governed by K.S.A. 60-1604(d).

V. INTERLOCUTORY ORDERS

A. Interlocutory orders in divorce, annulment, and separate maintenance cases are governed by K.S.A. 60-1607, as amended, S. Ct. Rule No. 139, and K.S.A. 60-252(a).

B. Interlocutory orders may

1. Jointly restrain the parties with regard to disposition of the property of the parties and provide for use of the property;

2. Restrain the parties from molesting or interfering with the privacy or rights of each other;

3. Provide for the custody and support of the minor children and the support of either spouse during the pendency of the action (child custody determinations may be made only in accordance with the uniform child custody jurisdiction act.);

4. Provide for the expenses of the suit and attorneys' fees so as to insure to either party efficient preparation for the trial of the case; or

5. Require an investigation by court service officers into any issue involved in the action. K.S.A. 60-1607.

C. Orders under the first three categories listed above may be entered ex parte upon compliance with supreme court rules. However, an ex parte order cannot change the custody of a minor child from the parent who has had sole de facto custody absent a showing of extraordinary circumstances If a party requests a hearing to vacat or modify an interlocutory order issued ex parte, the hearing must be held within 10 days of the request. K.S.A. 60-1607(b).

D. The judge may make any of these interlocutory orders without requiring bond or may enforce them through contempt proceedings. K.S.A. 60-1607(a). See Kemmerle v. Kemmerle, 171 Kan. 312.

E. Applications for ex parte interlocutory orders of support are governed by S. Ct. Rule No. 139. Strict compliance with this rule is required.

F. Attorneys' fees or temporary support, if awarded, should be awarded on the basis of need by one spouse and ability to pay by the other. However, attorneys' fees cannot be awarded ex parte. See Booker v. Booker, 199 Kan. 783; Craig v. Craig, 197 Kan. 345. See also the uniform child custody jurisdiction act.

VI. COUNSELING

A. At any time, upon motion by a party or on the court's own motion, the court may order that the parties and any of their children be interviewed by a trained professional in family counseling to determine if counseling with regard to matters of custody and visitation is in the best interests of the children. If the professional finds counseling is in the best interests of the children, the court may order the parties and any of the children to obtain such counseling. A party cannot be required to obtain counseling if it conflicts with sincerely held religious tenets and practices. K.S.A. 60-1617.

B. After the answer is filed, the court, on its own motion or on motion of one of the parties, may require both parties to the action to seek marriage counseling if such services are available within the judicial district of venue of the action. A party cannot be required to submit to counseling provided by any religious organization of any particular denomination. K.S.A. 60-1608(c).

C. The costs of any such counseling may be assessed as costs in the case.

VII. PRETRIAL CONFERENCE

If requested by either party, the court must set a pretrial conference to explore the possibility of settlement and to expedite the trial. It must be on a date other than the date of trial and the parties must be present or available within the courthouse. K.S.A. 60-1608(b).

VIII. THE TRIAL

A. PRELIMINARY CONSIDERATIONS

1. Time of Trial

A divorce action must not be tried until 60 days after the filing of the petition unless the judge enters an order declaring an emergency and stating the precise nature of the emergency, the substance of the evidence material to the emergency, and the names of the witnesses who gave the evidence.

Annulment and separate maintenance actions may be tried at any time after the issue is joined.

2. Required Fact Sheet and Written Inventory in Divorce Cases

At or prior to a divorce trial, a written inventory and fact sheet must be prepared by counsel and furnished to the court. S. Ct. Rule No. 164. The information to be included is listed in that rule.

B. ADMISSIONS; WITNESSES

The court may admit into evidence proof of the admissions of the parties if it appears that any such admission was not obtained by connivance, fraud, coercion, or other improper means. K.S.A. 60-1609(a).

Both parties are competent to testify upon all material matters involved in the controversy. K.S.A. 60-1609(c).

IX. THE DECREE (K.S.A. 60-1610)

A. PRELIMINARY CONSIDERATIONS

A decree of divorce, annulment, or separate maintenance may be granted on the uncorroborated testimony of either party. K.S.A. 60-1609(d). If the court requires corroboration, every detail of the injured party's testimony need not be supported. Talman v. Talman, 203 Kan. 601.

In an action for divorce, if the court finds that the parties are incompatible, it must grant a decree of divorce. The court may refuse to grant a decree of divorce or separate maintenance only if no grounds are established. K.S.A. 60-1606.

If the court denies a decree of divorce, annulment, or separate maintenance, it nevertheless shall if requested by either party make appropriate orders authorized by K.S.A. 60-1610. Child custody determinations may be made, however, only in accordance with the uniform child custody jurisdiction act. K.S.A. 60-1606.

If a court has granted the petitioner a decree of separate maintenance but has made no provisions for maintenance, the

same or another court, on a subsequent occasion, may grant the petitioner a decree of divorce and provide maintenance Childers v.Childers, 210 Kan. 105.

If a trial court intends to terminate the rights of inheritance of either party to the estate of the other party in an actio in which a decree of separate maintenance is granted, and property divided pursuant to K.S.A. 60-1610(c), the trial court's intent must be clearly specified in the decree. See Linson v. Johnson, Executrix 223 Kan. 442.

B. MINOR CHILDREN (K.S.A. 60-1610[a]1)

In awarding custody of a minor child:

1. Between Parents

The court's paramount consideration must be the best interests of the child. Neither parent has a presumptive right t custody. See also Grubbs v. Grubbs, 5 Kan. App. 2d 694.

Custodial orders shall include, but not b limited to, one of the following, in the order of preference:

a. Joint Custody. (If the court doe not order joint custody, it shall record the specific findings of fact upon which the alternative order is based.)

b. Sole Custody.

c. Divided Custody. (In exceptional cases only K.S.A. 60-1610[a][4][A

d. Non-parental Custody. (Where both parents are found unfit, the court may award custody to another person or agency if it is in the child's best interest. Such an order is not a severance of parental rights.
K.S.A. 60-1610[a][4][D]).

2. Between Parent and Non-Parent

A parent who has not been found to be an unfit person to have custody is entitled to custody as against any nonparent. Sheppard v. Sheppard, 230 Kan. 146.

If custody of a child is in dispute, all physician-patient and psychologist-client privileges are waived, except where counseling under K.S.A. 60-1608 is involved. If requested, the court may order physical and mental examinations of the parties under K.S.A. 60-235.

Prior custody orders may be changed or modified only when a material change of circumstances is shown.
K.S.A. 60-1610(a)(2).

In contested custody proceedings, the court may order an investigation and report concerning custodial arrangements for the child. If requested by any party, a record of the interview shall be made as part of the record in the case.
K.S.A. 60-1614.

The court may provide for custody of minor children only if the court has jurisdiction to make a child custody decree under the provisions of the uniform child custody jurisdiction act.

3. Support and Education.

The court may order either or both parent to pay support and education expenses for any child under 18 years of age, at which point support shall terminate unless the parents have agreed, by court approved written agreement, to pay support beyond that age. K.S.A. 60-1610(a)(1).

All relevant factors, including financial resources and need of both parents and child, and the physical and emotional condition of the child, shall be considered by the court in determining the amount to be paid for child support. Marital misconduct is not a relevant factor. K.S.A. 60-1610(a)(1).

Until a child reaches the age of 18, the court may set apart any portion of property of either parent that seems necessary and proper for the child's support. K.S.A. 60-1610(a)(1).

The court may modify or change any prior order when a material change in circumstances is shown. K.S.A. 60-1610(a)(1).

If the decree of divorce, annulment, or separate maintenance requires that child support be paid periodically, each installment becomes a final judgment on the date it is due and unpaid and may be enforced in the same manner as other judgments. Brieger v. Brieger, 197 Kan. 756. During a child's minority, laches will not bar enforcement of past due child support obligations which are otherwise enforceable. Strecker v. Wilkinson, 220 Kan. 292; Effland v. Effland, 171 Kan. 657.

C. DIVISION OF PROPERTY
(K.S.A. 60-1610[b][1])

The property of the parties must be divided in a just and reasonable manner without regard to the date or manner of acquisition. The court can make the division in kind, or by giving all or a portion of the property to one spouse and requiring either to pay to the other a just and proper sum, or by ordering a sale of the property and dividing the proceeds. See K.S.A. 60-1610(b)(1) for the factors to be considered by the court in making the division of property.

A trial court has no power to modify subsequently that part of a decree that divides the property of the parties. Drummond v. Drummond, 209 Kan. 86.

D. MAINTENANCE
(K.S.A. 60-1610[b][2])

An allowance for future support may be awarded to either party. Such an allowance is denominated maintenance and can be either in a lump sum or in periodic payments or on a percentage of earnings or on any other basis. Payments may be conditional or terminable.

The court may not initially award maintenance for a period of time exceeding 121 months. If the original decree reserves the power of the court to hear motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the original period the court may reinstate the maintenance in whole or in part for a period not exceeding 121 months. There may be subsequent motions for reinstatement of maintenance, but no single period of reinstatement can exceed 121 months.

The court may decrease the amount of maintenance originally awarded but not yet due if circumstances exist that would justify it. There must be a hearing on the matter and reasonable notice must have been given to the party who will be affected.

Maintenance may not be increased or accelerated without the consent of the party liable for the maintenance.

If a maintenance agreement between the parties was incorporated into the decree, the court may not modify the terms of the decree relating to maintenance unless the agreement itself so provided or unless the parties consent to the modification. K.S.A. 60-1610(b)(3).

E. SEPARATION AGREEMENTS
(K.S.A. 60-1610[b][3])

If the parties have entered into a separation agreement which the court finds to be valid, just, and equitable, the court must incorporate it into the decree. Except as to support, custody, and education of minor children, a separation agreement that has been incorporated into the decree may not be modified without the consent of the parties or unless the agreement itself so provides.

F. RESTORATION OF NAME
(K.S.A. 60-1610[f])

Upon the request of a spouse, the court must order the restoration of that spouse's maiden or former name.

G. EFFECTIVE DATE OF THE DECREE

The effective date of the decree is governed by K.S.A. 60-258 and S. Ct. Rule No. 170.

X. COSTS AND FEES [K.S.A. 60-1610(b)(4)]

Costs and attorney's fees may be awarded to either party as justice and equity require. The court may order the fees paid directly to the attorney, who may enforce the order in the attorney's name in the same case.

Generally, if one party is unable to pay his or her attorneys' fees and the other party is able to pay his or her own attorneys' fees as well as the other party's attorneys' fees, the party financially unable to pay should be awarded attorneys' fees.

XI. REMARRIAGE [K.S.A. 60-1610(c)(2)]

Generally, neither party may remarry unti the expiration of the time for appeal fro the judgment of divorce or, if an appeal is taken, until the judgment becomes fina However, an agreement approved in the dec to waive the right of appeal is effective to shorten the period of time in which remarriage is prohibited. See K.S.A. 60-258, 60-2103, and 60-2106(c).

XII. DECREES OF OTHER STATES (K.S.A. 60-1611)

If a divorce decree has been rendered in an action in another state, and if the respondent in that action was a Kansas resident at the time of the decree who neither appeared personally nor defended the action, and if the court that

rendered the decree did not have personal jurisdiction over the respondent, all matters relating to maintenance, property rights, and support of the minor children may be relitigated in Kansas within two years after the date of the foreign decree. Perrenoud v. Perrenoud, 206 Kan. 559.

However, child custody determinations, as defined by the uniform child custody jurisdiction act, may be made only in accordance with that act.

XIII. ASSIGNMENTS

The court may order the person obligated to pay child support or maintenance to make an assignment of a part of periodic earnings or trust income to the person entitled to receive support or maintenance payments. K.S.A. 60-1613.

XIV. VISITATION

A parent not granted custody is entitled to reasonable visitation unless such visitation would seriously endanger the child's physical, mental, moral, or emotional health. Grandparents and stepparents may be granted visitation. Orders granting or denying visitation may be modified when modification would serve the best interests of the child. K.S.A. 60-1616.

"Marriage is a damnable serious business ... particularly around Boston."

John P. Marquand
(1893-1960)

DRIVING WHILE INTOXICATED

I. BLOOD ALCOHOL TEST - REFUSAL TO SUBMIT

II. BLOOD ALCOHOL TEST - PRESUMPTIONS

DRIVING WHILE INTOXICATED

I. BLOOD ALCOHOL TEST - REFUSAL TO SUBMIT

Any person who operates a motor vehicle upon a public highway within this State impliedly consents to submit to a chemical test of his breath or blood to determine the alcohol content of the blood. K.S.A. 8-1001, as amended, provides that the defendant's refusal to submit to such test shall be admissible in evidence against the person at any trial for driving while under the influence of alcohol.

II. BLOOD ALCOHOL TEST - PRESUMPTIONS

Upon trial, evidence as to the alcohol content of the defendant's blood at the time of his arrest shall give rise to the following presumptions:

1. If less than .10% by weight, it may be considered along with other competent evidence in determining whether the defendant is under the influence of a combination of alcohol and any drug;

2. If .10% by weight, it shall be prima facie evidence that the defendant was under the influence to a degree that renders the defendant incapable of driving safely.

APPENDIX "A"

MANDATORY ORDERS

Conviction	Fine		Sentence		ADSAP	Driver's License Suspension		$85.00 Assessment
	Minimum	Maximum	Minimum	Maximum		Minimum	Maximum	
1st	$200	$500	48 hrs. (a)	6 mos.	Yes	90 days (b)	1 yr.	yes (c)
2nd	$500	$1000	90 days (d)	1 yr.	— (e)	1 yr. (f)	—	yes (c)
3rd or Subsequent	$1000	$2500	90 days	1 yr.	— (e)	1 yr. revocation	—	yes (c)
Diversion	$200	—	—	—	yes	—	—	yes (g)

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DISCRETIONARY ORDERS

(1984 Supp.)

In its discretion the Court may order:

a) 100 hours community service in lieu of 48 hours minimum sentence.

b) Defendant be granted a restricted driver's license to drive to, from, and in the course of employment, during a medical emergency, and to and from ADSAP program.

c) Assessment waived if defendant is found to be indigent.

d) Minimum sentence reduced to not less than 5 days upon completion of ADSAP treatment program.

e) Completion of ADSAP educational or treatment program or both.

f) Driver's license suspension until ADSAP program is completed.

ELECTRONIC SURVEILLANCE

ELECTRONIC SURVEILLANCE

I. APPLICABLE STATUTES AND DEFINITIONS

K.S.A. 21-4001 defines the crime of eavesdropping and makes the crime a class A misdemeanor. Illegal electronic surveillance would be eavesdropping under K.S.A. 21-4001(b) or (c).

Certain conduct or activity that would otherwise constitute the crime of eavesdropping is authorized by K.S.A. 22-2514 through 22-2517, as amended, and K.S.A. 22-2518 and 22-2519.

K.S.A. 22-2514, as amended, is the statute that contains the definitions of terms pertinent to the statutes governing electronic surveillance.

II. RULES

A. A wire or oral communication may be intercepted through the use of an electronic, mechanical, or other device only if:

1. A district judge or associate district judge or other judge of competent jurisdiction has issued an order authorizing interception after determining from the facts set forth in the application that

   a. There is probable cause to believe that the person whose communication are to be intercepted is committing has committed, or is about to commi one of the crimes listed at K.S.A. 22-2515(1), as amended;

b. There is probable cause to believe that the interception will provide evidence of one or more of those crimes;

c. There is probable cause to believe that the facilities from which, or the place where, the wire or oral communications are to be intercepted are (1) being used, or about to be used, for purposes related to the commission of the crime, or are (2) leased to, listed in the name of, or commonly used by the person whose communications are to be intercepted;

d. Normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or reasonably appear to be too dangerous; and

2. The interception will be conducted by an investigative or law enforcement officer and agency having responsibility for the investigation of the enumerated offenses. K.S.A. 22-2515(1) and 22-2516(3), as amended.

B. The issuance of an order authorizing the interception of wire or oral communications is not mandatory.

C. A district magistrate judge has no power or authority to issue an order authorizing interception of a wire or oral communication. K.S.A. 22-2515(1) and 22-2514(8).

D. A district judge or an associate district judge to whom the application was made may issue an order authorizing the interception of a wire or oral communication only in the judge's judicial district or in a judicial district to which the judge is temporarily assigned. K.S.A. 22-2516(3), as amended, and 20-301a, as amended.

E. A privileged wire or oral communication remains privileged even though its interception complied with statutory requirements. K.S.A. 22-2515(5).

III. THE APPLICATION (K.S.A. 22-2516(1), as amended)

The application for an order authorizing the interception of a wire or oral communication must be in writing, upon oath or affirmation, and must set forth:

A. The name of the prosecuting attorney making the application and the name of the law enforcement officer requesting the application;

B. The facts and circumstances the applicant believes justifies the issuance of an order;

C. Whether other investigative procedures have been tried and failed or why other procedures would be unsuccessful or too dangerous;

D. The period of time over which communications will be intercepted;

E. If appropriate, the facts establishing probable cause to believe that the types of communications sought will be of a continuing nature and why the interception should continue during the entire period of the order rather than terminate upon interception of the first communication of the type sought;

F. Information concerning all previous applications made to any judge involving the same person, facilities, or places, and the action taken on those applications;

G. The results obtained to date or an explanation of the failure to obtain any results to date, if the application is for an extension of a previous order.

The judge may require the applicant to furnish additional testimony or documentary evidence. Oral testimony must be given upon oath or affirmation and in the presence of a certified shorthand reporter and must be reduced to writing. K.S.A. 22-2516(2), as amended.

IV. THE ORDER (K.S.A. 22-2516(4), as amended)

The order must:

A. Identify the person, if known, whose communications are to be intercepted;

B. Specify the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;

C. Specify with particularity the type of communication sought and the offense to which it relates;

D. Specify each agency authorized to intercept the communication;

E. Specify the applicant;

F. Specify the period of time during which interception is authorized and state whether the authority to intercept will terminate automatically upon the interception of a single communication of the type sought;

G. If the applicant requests it, direct necessary assistance by a communication common carrier, public utility, landlord, custodian, or other person.

The order may not grant authority to intercept communications for a period of time greater than necessary to achieve the purpose of the order. In no event may the order authorize a period of time exceeding 30 days.

Every order must contain a provision that the authorization to intercept must be executed as soon as practicable and in such a way as to minimize the interception of communications not otherwise subject to interception, and that the authorization will terminate upon attainment of the purpose of the order, or on the date specified, whichever occurs first.

The order may require reports to be made to the judge who issued the order showing what progress has been made toward

achievement of the purpose of the order and the need for continued interception. K.S.A. 22-2516(6), as amended.

V. ADDITIONAL PROCEDURES

A. Within 30 days after the expiration of an order authorizing the interception of wire or oral communications, the judge who issued the order must report the information required by 18 U.S.C. §2519 to the Administrative Office of the United States Courts. A duplicate copy of the information report must be filed with the state judicial administrator. See K.S.A. 22-2519.

The information required by 18 U.S.C. §2519 is as follows:

1. The fact that an order or an extension was applied for;

2. The kind of order or extension applied for;

3. The fact that the order or extension was granted as applied for, modified, or denied;

4. The period of time authorized for interceptions, and the number and duration of any extensions of the order;

5. The offense specified in the order or application, or in an extension of an order;

6. The identity of the applicant (the prosecuting attorney) and the identity of the investigative or law enforcement officer requesting that the application be made; and

7. The nature of the facilities from which or the place where communications were to be intercepted.

B. Within 90 days after the expiration of the period of time during which the interception of wire or oral communications was permitted either by an initial order or by an extension of an initial order or within 90 days after the denial of an application for such an order, the judge to whom the application was made must furnish or require someone to furnish, unless postponed as noted below, to the person whose communications were intercepted and to such other parties to the intercepted communications as the judge orders, a notice

1. That an order was applied for and was entered on a specified date or was denied;

2. The period of time requested for the interceptions and the period of time authorized; and

3. That wire or oral communications were or were not intercepted during an authorized period. K.S.A. 22-2516(7)(d

The judge may postpone the giving of the notice upon a showing of good cause.

Upon motion, the judge may make available for inspection to the person whose communications were intercepted any portion of the application, order, or intercepted communications.

C. Applications made and orders granted must be sealed by the judge, may be disclosed only upon a showing of good cause, and may not be destroyed except on order of the judge and then only after the expiration of ten years. K.S.A. 22-2516(7)(b).

D. If possible, the contents of any intercepted wire or oral communication should be recorded by tape recorder or by a comparable device and in a manner that will prevent editing or alteration. Upon expiration of the period of the order, the recordings are to be turned over to the judge who must seal them and provide for their custody for a period of at least 10 years.

VI. USE OF INTERCEPTED COMMUNICATIONS AS EVIDENCE

A. Any person who has received any information concerning a lawfully intercepted wire or oral communication may disclose the contents of such communication while giving testimony under oath or upon affirmation in any criminal proceeding or before any grand jury. K.S.A. 22-2515(4), as amended.

B. The contents of a wire or oral communication relating to an offense not specified in the order but intercepted while wire or oral communications were being intercepted lawfully may be disclosed in a criminal proceeding or before a grand jury if the judge finds, on subsequent application, that the contents otherwise were intercepted in accordance with law.
K.S.A. 22-2515(6), as amended.

C. The contents of a any intercepted wire or oral communication may not be received into evidence or otherwise disclosed at a trial, hearing, or other proceeding unless at least 10 days before the proceeding each party has been given a copy of the application and order. The 10 day period may be waived by the judge if the judge finds that the order and application could not be given to the parties within that time and that neither party will be prejudiced by the delay in receiving a copy of the order and application.
K.S.A. 22-2516(8), as amended.

D. If the disclosure of the contents of an intercepted wire or oral communication would be in violation of Article 25 of Chapter 22 of the Kansas Statutes Annotated, the contents may not be received into evidence at any proceeding.
K.S.A. 22-2517, as amended.

EXTRADITION

I. APPLICABLE CODE

II. DEFINITIONS

III. PERSONS WHO MAY BE EXTRADITED

IV. JUDICIAL INVOLVEMENT IN EXTRADITION PROCEEDINGS

A. EXTRADITION TO KANSAS
B. EXTRADITION FROM KANSAS

EXTRADITION

I. APPLICABLE CODE

Extradition is governed by K.S.A. 22-2701 et seq, as amended. (Uniform Criminal Extradition Act)

II. DEFINITIONS

"Extradition" is the surrender or delivery of a person by one state or territory to another that has jurisdiction to try and to punish such person as a criminal and that is demanding such surrender or delivery.

"Commission of Agent" is the appointment by the governor of the demanding state of an agent and the conferring of authority on that agent to receive the demanded person from the authorities in the asylum state and to transport such person to the demanding state.

"Requisition" is a demand to the governor of the asylum state that the demanded person be surrendered to the authorized agent of the demanding state.

"Rendition Warrant" is a warrant issued by the governor of the asylum state ordering the arrest of the demanded person and his or her delivery, subject to K.S.A. 22-2710, to the agent of the demanding state or territory.

III. PERSONS WHO MAY BE EXTRADITED

A person present in the asylum state may be extradited, in accordance with required procedure, by that state to another state if he or she:

A. Is charged in the demanding state with a crime (K.S.A. 22-2702);

B. Is charged with committing an act in the asylum state or in a third state that intentionally resulted in a crime in the demanding state, even though the accused was not in the demanding state at the time of the commission of the crime, and had not fled from the demanding state (K.S.A. 22-2706);

C. Had been convicted of a crime in the demanding state and had escaped from confinement for that crime (K.S.A. 22-2703);

D. Had been convicted of a crime in the demanding state and had broken the terms of bail, probation, or parole (K.S.A. 22-2703); or

E. Had been sentenced for a crime in the demanding state but has neither served the sentence nor been paroled, discharged, or otherwise released from the sentence (K.S.A. 22-2703).

NOTE: That the demanded person left the demanding state involuntarily is not a bar to his or her extradition. See Woody v. State, 215 Kan. 353.

IV. JUDICIAL INVOLVEMENT IN EXTRADITION PROCEEDINGS

A. EXTRADITION TO KANSAS

In proceedings to extradite a person to Kansas, a Kansas judge may have to authenticate copies of the pertinent indictment, information, complaint, affidavit, judgment of conviction, or sentence. K.S.A. 22-2723, as amended.

The judge otherwise will not be involved unless the applicant must submit, with the application for requisition, an affidavit charging the demanded person with the commission of a crime. If so, the judge, acting as magistrate, may be called upon to administer the oath to the affiant so that the affidavit will have been executed properly. See K.S.A. 22-2703.

B. EXTRADITION FROM KANSAS

Major steps and judicial involvement at each stage of the extradition process are as follows:

1. If requisition has not yet been submitted to the governor of Kansas:

a. The fugitive is arrested pursuant to a fugitive warrant or upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year.

Judicial Involvement: The fugitive warrant will be issued in Kansas by a magistrate if the conditions of K.S.A. 22-2713 are met. If the arrest is without a warrant the fugitive must be taken before a magistrate pursuant to K.S.A. 22-2714.

b. The fugitive is committed to jail to await requisition, freed on bond, or consents to return to the demanding state thereby waiving the issuance and service of a rendition warrant as well as all other procedures incidental to extradition proceedings.

Judicial Involvement: The judge will commit the fugitive to jail for 30 days if the conditions of K.S.A. 22-2715 are met. Extensions of the 30 day period are governed by K.S.A. 22-2717. The fugitive could apply at this stage of the proceedings for a writ of habeas corpus.

If the conditions of K.S.A. 22-2716 are met, the judge has discretion to release a fugitive on bond, but the release must be conditioned on the fugitive's appearing before the judge at a time specified in the bond and for the fugitive's surrender for the purpose of being arrested on a rendition warrant. The bond may be forfeited and the released fugitive rearrested if the conditions of K.S.A. 22-2718 are met.

If the fugitive waives the incidents of extradition proceedings, he or she must do so in writing and in the presence of a judge. Before the

execution of the waiver document, however, the judge must inform the fugitive of the right to the issuance of a governors warrant, the right to demand and procure counsel and to apply for a writ of habeas corpus. After the waiver, the judge must direct the officer having the custody of the fugitive to deliver the fugitive to the duly authorized agent of the demanding state. The judge must also deliver or have delivered to the agent a copy of the consent. K.S.A. 22-2710, 22-2726, 22-4503.

2. If the fugitive does not waive the incidents of an extradition proceeding or, as the initial step in the extradition process:

a. The governor of the demanding state issues a requisition and commission of agent and sends required papers to the asylum state.

b. The governor of the asylum state may investigate the demand by holding a hearing to inquire into the situation and circumstances of the person demanded, and whether he or she ought to be surrendered.

c. The governor of the asylum state decides to comply or refuses to comply with the requisition.

d. If the governor decides to comply, the governor issues a requisition warrant and the person demanded is arrested pursuant to this warrant.

e. Before the demanded person is handed over to the agent of the demanding state, he or she is taken before a judge of the asylum state.

Judicial Involvement: The judge is required by K.S.A. 22-2710 to inform the demanded person that there is a demand for his or her surrender, that he or she has a right to counsel, and that if the person desires to test the legality of his or her arrest, the judge will allow a reasonable amount of time to apply for a writ of habeas corpus.

f. If the person does not desire to test the legality of his or her arrest, a waiver of the habeas corpus proceeding must be executed pursuant to K.S.A. 22-2726. If the person does desire to test the legality of the arrest and applies for a writ of habeas corpus within the time allotted, a habeas corpus proceeding is held.

Judicial Involvement. The judge will conduct the habeas corpus proceeding. Guilt or innocence may not be considered. K.S.A. 22-2720.

At the habeas corpus hearing the judge must determine the following:

1. Whether statutory requirements for extradition have been met.

2. Whether defendant is the person named in the extradition order.

3. Whether defendant has been charged with a crime in the demanding state.

4. Whether the defendant is a fugitive.

If the extradition papers are in order and the defendant is the person named in the extradition order, and is charged with a crime in the demanding state, and is a fugitive the writ must be denied. Gladnay v. Sheriff of Leavenworth County, 3 Kan.App.2d 568, 598 P.2d 559 (1979).

NOTE: The court of the asylum state may not inquire into probable cause, and all case law to that effect was overruled by Michigan v. Doran, 439 U.S. 283, 58 L.Ed.2d 521, 99 S.Ct. 530 (1979).

g. The duly authorized agent of the demanding state is given custody of the demanded person and transports the person to the demanding state for criminal proceedings or imprisonment.

FAIR TRIAL AND FREE PRESS

I. CRIMINAL ACTIONS: BALANCING THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO A FREE PRESS

- A. PRELIMINARY CONSIDERATIONS
- B. THE KIND OF PUBLICITY THAT WILL PREVENT A FAIR TRIAL
- C. EFFECT OF PREJUDICIAL PUBLICITY ON THE IMPARTIALITY OF A JUROR
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- E. PRIOR RESTRAINTS ON THE NEWS MEDIA
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- G. CONTROL OVER THE NEWS MEDIA DURING TRIAL
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II. CIVIL ACTIONS: BALANCING THE RIGHT TO PRIVACY AND THE RIGHT TO A FREE PRESS

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FAIR TRIAL AND FREE PRESS

I. CRIMINAL ACTIONS: BALANCING THE RIGHT TO A FAIR TRIAL AND THE RIGHT TO A FREE PRESS

A. PRELIMINARY CONSIDERATIONS

A state is required to afford an accused a trial by an impartial jury. Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Nebraska Press Assn. v. Stuart, 427 U.S. 539, 551 (1976). A state is also prohibited from making laws abridging the freedom of the press. Near v. Minnesota, 283 U.S. 697, 707 (1931); Nebraska Press Assn. v. Stuart, 427 U.S. 539, 556 (1976).

Publicity concerning criminal cases, however, may result in a conflict between the right to a fair trial and the exercise of the right to a free press. If there is such a conflict or if it appears that there will be such a conflict, the trial judge will have to balance these two competing, but equal, constitutional rights.

U. S. Supreme Court cases which have dealt with this problem include:

Sheppard v. Maxwell, 384 U.S. 333 (1966).
Estes v. Texas, 381 U.S. 532 (1965).
Rideau v. Louisiana, 373 U.S. 723 (1963).
Irvin v. Dowd, 366 U.S. 717 (1961).
Janko v. U.S., 366 U.S. 716 (1961).
Marshall v. U.S., 360 U.S. 310 (1957) (but see Murphy v. Florida, 421 U.S. 794, 797 (1975)).

B. THE KIND OF PUBLICITY THAT WILL PREVENT A FAIR TRIAL

Publicity that is prejudicial to the defendant may prevent a fair trial. Publicity that creates a probability of prejudice to the defendant also may prevent a fair trial (see Sheppard v. Maxwell, 384 U.S. 333 (1966); and Estes v. Texas, 381 U.S. 532 (1965)) even though actual prejudice or jury exposure to the publicity cannot be shown.

To be prejudicial or to create the probability of prejudice, publicity usually must be of a certain quality. To prevent a fair trial, the publicity additionally must be of a certain quantity.

1. Quality

Generally, the publicity must incriminate the defendant and contain information or opinions that are not admissible or not admitted as evidence. Reporting events and testimony that occur in the courtroom is not prejudicial publicity. Sheppard v. Maxwell, 384 U.S. 333, 362-363, (1966).

2. Quantity

Some degree of juror exposure to prejudicial publicity, though, is tolerated. The quantity of publicity or degree of exposure allowed, however, is difficult to measure. Generally, if the quantity has been such that actual prejudice on the part of the jury is demonstrated, or if a carnival atmosphere pervades the proceedings, or if the community has been exposed to massive and pervasive publicity, the defendant

cannot receive a fair trial. See Murphy v. Florida, 421 U.S. 794, 798-799 (1975).

C. EFFECT OF PREJUDICIAL PUBLICITY ON THE IMPARTIALITY OF A JUROR

A juror's statement that prejudicial publicity will have no influence on the juror is insufficient to certify the juror's impartiality. See Irvin v. Dowd, 366 U.S. 717, 728 (1961).

D. WHEN THE IMPARTIALITY OF THE JURY MAY BE AFFECTED

The impartiality of the jury or prospective jury may be affected most commonly by the publication of pictures or of a statement made to the media by the accused or by publicity regarding events that occurred during a Jackson v. Denno hearing on the voluntariness of a confession; or during a hearing to determine whether evidence had been obtained by an unlawful search and seizure; or during a hearing to determine whether evidence may be introduced solely under the authority of K.S.A. 60-455.

A trial judge must recognize the possibility that there may be a need to take precautionary measures in these situations to prevent jury prejudice.

E. PRIOR RESTRAINTS ON THE NEWS MEDIA

Prior restraint on speech and publication are the most serious and least tolerable infringements on First Amendment rights. See Nebraska Press Assn. v. Stuart, 427 U.S. 539, 559 (1976).

Any order prohibiting publication of any material bears a heavy presumption against constitutional validity. New York Times Co. v. United States, 403 U.S. 713, 714 (1971). The requirements for overcoming the presumption have not been formulated by the Supreme Court. See, however, Nebraska Press Assn. v. Stuart, 427 U.S. 539, 563-567. The validity of a prior restraint is so unlikely that prior restraints should not be imposed.

F. POWER OF THE COURT TO EXCLUDE THE MEDIA FROM JUDICIAL PROCEEDINGS

1. Pretrial Hearings

a. In Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 61 L.Ed.2d 608, 99 S.Ct. 2898 (1979), the U.S. Supreme Court made some significant rulings in the area of pretrial suppression hearings that should be considered in reading this chapter.

In DePasquale, the court held in the majority opinion as follows re pretrial suppression hearings:

i. Neither the public nor the media have a constitutional right by virtue of either the Sixth or Fourteenth Amendment to attend pretrial suppression hearings.

ii. The trial judge has an affirmative constitutional duty to minimize the effects of pretrial publicity so as to safeguard the defendant's due process rights.

iii. Where it appears that publicity of pretrial suppression hearings may influence public opinion or inform potential jurors of inadmissible evidence, the trial judg may close pretrial suppression hearings.

iv. Where a pretrail suppression hearing is closed for the above reasons, the Court approved a procedure where a transcript of such was made available after the danger of publicity has passed.

b. In Kansas City Star v. Fossey, 230 Kan. 240, the Kansas Supreme Court applied DePasquale and held as follows:

i. A trial court may close a preliminary hearing, bail hearing, or any other pretrial hearing, including a motion to suppress, and may seal the record only if: (1) The dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (2) the prejudicial effect of such information on trial fairness cannot be avoided by reasonable alternative means.

ii. Fair Trial and Free Press: Standard 8-3.2 which was adopted in August, 1978 by the American Bar Association's Standing Committee on Association Standards for Criminal Justice

represents the most acceptable approach to the right-of-access problem. The standard reads as follows:

"Except as provided below, pretrial proceedings and their record shall be open to the public, including representatives of the news media. If at the pretrial proceeding testimony or evidence is adduced that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information by means of public communication until the impaneling of the jury or until an earlier time consistent with the fair administration of justice. The presiding officer may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a motion to suppress, and may seal the records only if: (i) the dissemination of informtion from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial, and (ii) th prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means. The defendant may move that all or part of the proceeding be closed to the public (including representatives of the news media), or, with the consent of the defendant, the presiding officer may take such action sua sponte or at the suggestion of the prosecution.

Whenever under this rule all or par of any pretrial proceeding is held in chambers or otherwise closed to the public, a complete record shall be kept and made available to the public following the completion of trial or earlier if consistent with trial fairness. (iii) To insure compliance with this standard, a record of the hearing where the issue of closure is determined should be prepared. In making a decision of either closure or non-closure, the trial judge should mak findings and state for the record the evidence upon which the court relied and the factors which the court considered in arriving at its decision. Such a procedure will protect both the right of the defen dant to a fair trial and the right of the public and news media to hav access to court proceedings."

2. Trials

In Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 281 (1980), the U. S. Supreme Court made the following rulings in the area of trials:

a. A trial courtroom is a public place where the people generally and representatives of the media have a First Amendment and Fourteenth Amendment right to be present.

b. There is an inherent constitutional presumption that the exercise of this First Amendment and Fourteenth Amendment right to the public and

media will not deny the defendant his superior Sixth Amendment right to a fair trial.

c. This presumption may be overcome only by evidentiary findings clearly demonstrating that various tested alternatives would be insufficient to satisfy the constitutional demands of fairness. (See Nebraska Press Association v. Stuart, 427 U.S. 563-565 (1976); Sheppard v. Maxwell, 384 U.S. 333 at 357-362 [1966]).

See also, Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10 Cir. 1982).

G. CONTROL OVER THE NEWS MEDIA DURING TRAIL (Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

No order should be directed at the media which prevents the reporting of events occurring in the courtroom.

Both the courtroom and the courthouse premises are subject to the control of the court. See, the Control of the Courtroom section of the Miscellaneous Chapter.

A trial judge has the power to:

1. Limit the number of reporters in the courtroom; direct the area where they may sit; control their behavior in the courtroom; prohibit the use of electronic recording devices and cameras; and stop generally disruptive behavior;

2. Insulate witnesses from outside influences, sequester witnesses, and admonish them to avoid contact with the media;

3. Prohibit counsel from releasing information to the media which might impair the Sixth Amendment rights of the accused.

4. In cases of massive pretrial publicity, continue the case or transfer it to another county if either would further protect the rights of the accused; and

5. Sequester the jury after the trial has commenced.

Although the media should be allowed to observe events that occur in the courtroom during the course of trial, the trial court has the power to prevent media access from the following events and information sources:

1. Bench conferences between court and counsel during the course of trial. U.S. v. Gurney, 558 F.2d 1202 (5 Cir. 1977).

2. Documents and exhibits offered by one party but not received into evidence. U.S. v. Gurney, supra.

3. Grand jury testimony of a defendant that was not read to the trial jury. U.S. v. Gurney, supra.

4. Communications between the judge and jury prior to determination of the case by the jury. U.S. v. Gurney, supra.

5. The list of names and addresses of jurors sworn to try the case. U.S. v. Gurney, supra.

6. Inspection of documents, or other evidentiary matter of a physical nature by the trial court prior to determination of its admissibility in evidence. U.S. v. Lopez, 328 F.Supp. 1077.

H. POWER TO COMPEL DISCLOSURE OF INFORMATION AND IDENTITY OF NEWS SOURCES

A newsperson has a limited privilege of confidentiality of information and identity of news sources. The existence of the privilege in a particular criminal case depends upon a balancing of the defendant's need for confidentiality. See In re Pennington, 224 Kan. 573, 581 P.2d 812 (1978).

II. CIVIL ACTIONS: BALANCING THE RIGHT TO PRIVACY AND THE RIGHT TO A FREE PRESS

A. PRELIMINARY CONSIDERATIONS

In civil actions, the interest which may compete with the constitutional right to a free press is the right to privacy rather than the right to a fair trial. The right to privacy may be asserted by parties or by persons not parties to the litigation. The usual remedy for invasion of privacy is a tort action in a state court.

Since the law of privacy remains in its formative stage, only the following guidelines are suggested.

B. SUGGESTED GUIDELINES

1. All proceedings conducted in the court room are to be public and the media is to be granted access thereto. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

2. All hearings and proceedings which involve matters of legitimate public concern should be conducted in the public courtroom even though publication of what occurs might cause harm o distress to someone. No proceeding which involves a matter of legitimate public concern should be conducted in private if the media is excluded. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

3. All evidentiary hearings where testimony is to be heard should be conducte in the courtroom unless:

   a. There is an overpowering private concern of a confidential nature which is not a matter of legitimat public concern and which would cause harm or distress to someone if the matters revealed were publicized; or

   b. The parties have agreed that the matter be heard in private.

4. Hearings may be held in chambers with the public excluded even over objection of a party if such action is reasonably necessary to separate the trier of facts from inadmissible prejudicial information. This would include hearings to determine questions regarding the admissibility of evidence motions in limine; and offers of proof.

5. The only types of hearings from which the media might be validly excluded over objection of a party or in an action in which the media is a party are those in which some public interest would be defeated by public disclosure (see e.g., United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 [2d Cir. 1975] and United States v. Bell, 464 F.2d 667 [2d Cir. 1972]); or those in which the subject matter of the hearing necessarily will reveal the content of records which are not of legitimate public concern, are private in nature, and declared by law to be confidential and not to be released to the public. See e.g., K.S.A. 39-934, 59-2931; and 65-4019.

See also, Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10 Cir. 1982).

C. POWER TO COMPEL DISCLOSURE OF INFORMATION AND IDENTITY OF NEWS SOURCES

See In re Pennington, 224 Kan. 573, 581 P.2d 812 (1978).

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

Herbert v. Lando, 441 U.S. 153, 60 L.Ed.2d 115, 99 S. Ct. 1365 (1979)

GRAND JURIES

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GRAND JURIES

I. PRELIMINARY CONSIDERATIONS

A. PURPOSE

In Kansas, most state criminal prosecutions are commenced by the filing of a complaint or an information. Statutory law, however, additionally allows the commencement of a state criminal prosecution upon the return of an indictment by a grand jury.

The grand jury proceeding is a means by which investigation of possible criminal activity may be undertaken, and prosecution commenced, when lack of investigative or prosecutorial action by appropriate officials is contrary to the public interest.

B. DEFINITIONS

A "grand jury" is a group of 15 persons, impaneled in accordance with law, having the duty to investigate alleged violations of the law occurring or triable within the county from which the jurors are drawn in order to determine whether there exists probable cause to believe that a crime has been committed and that a specified person or persons committed the crime, and to return indictments against such persons.

An "indictment" is a written statement, presented by a grand jury to a court, charging the commission of a crime. When an indictment is returned, a prosecution has been begun.

II. SUMMONING THE GRAND JURY

A. INITIATING A GRAND JURY INVESTIGATION

1. A grand jury may be summoned by a majority of the district judges and associate district judges in any judicial district. The grand jury may be summoned in any county in the district when such majority determines that summoning a grand jury is in the public interest. K.S.A. 22-3001, as amended.

2. A grand jury must be summoned in a particular county within 60 days after a valid petition for a grand jury is presented to the district court.

   The petition must bear that number of elector signatures which is equal to 100 plus 2% of the total number of votes cast in the county for the office of governor at the last election for such office. The petition form is prescribed by K.S.A. 22-3001 (2), as amended.

   After the petition is filed in the office of the clerk of the district court, it is given to the county election commissioner or, if the county has no such officer, to the county clerk who determines whether the signatures on the petition are signatures of qualified electors of the county. The petition is then returned to the clerk of the district court with a certificate stating the number of qualified electors whose signatures appear on the petition,

and the total number of votes cast in the county for the office of governor at the last election for such office.

The judge or judges of the district court then determine whether the petition is in proper form and bears the required number of signatures. If so, the petition is valid and a grand jury must be summoned.

B. HOW GRAND JURORS ARE SELECTED

Grand jurors are drawn in the same manner as petit jurors. K.S.A. 22-3001(3), as amended. See K.S.A. 43-107, 43-155 et seq.

C. CHALLENGING THE GRAND JURY OR A MEMBER OF THE GRAND JURY (K.S.A. 22-3002)

1. The prosecuting attorney may challenge the array of jurors on the ground that the grand jury was not selected, drawn, or summoned in accordance with law.

   The prosecuting attorney may challenge an individual juror on the ground that the juror is not legally qualified.

   Challenges by the state must be made before the jurors are sworn. Challenges are tried by the court.

2. The only other challenges permitted are those by a person who has been indicted by the grand jury. After being indicted, the person may challenge the grand jury or individual members of the grand jury by means of a motion to dismiss the indictment.

The grounds for the motion may be that the grand jury was not selected, drawn, or summoned in accordance with law or that an individual juror is not legally qualified.

NOTE: Before an indictment could be dismissed on the grounds that individual jurors were not legally qualified, four of the 15 jurors must be proven not legally qualified. See K.S.A. 22-3002(2).

D. EXCUSING AND REPLACING A GRAND JUROR

At any time, the court may excuse a grand juror, either temporarily or permanently, for cause shown. If a grand juror is excused permanently, the court may impanel another person to take the place of the excused juror. K.S.A. 22-3013(2).

III. PREPARING THE GRAND JURY FOR ITS WORK; LENGTH OF SERVICE

A. APPOINTMENT OF A FOREMAN AND A DEPUTY FOREMAN

The court must appoint one of the grand jurors to be the foreman and another to be the deputy foreman. The foreman will administer oaths and affirmations and must sign all indictments. The deputy foreman serves as foreman in the absence of the foreman. K.S.A. 22-3004.

B. OATHS

The substance of the oath given to the foreman and to the other grand jurors is set out at K.S.A. 22-3003.

C. APPOINTMENT OF A RECORDKEEPER; DUTIES

The foreman or another person appointed by the foreman must keep a record of the name of each juror concurring in every indictment. In order to avoid any procedural problems, the judge should ascertain, before he or she charges the grand jury, who the recordkeeper will be. The recordkeeper must file the record with the clerk of the court, and the record may not be made public except through court order. K.S.A. 22-3004.

D. THE COURT'S CHARGE TO THE GRAND JURY

After the grand jury is sworn, the court must give the grand jurors any information required by law or that is proper regarding the duties of the grand jury. The judge must also inform the grand jurors about any charges of crimes known by the court and likely to come before the grand jury. Once charged, the grand jury retires to a private room to conduct its business. K.S.A. 22-3005.

E. EMPLOYEES OF THE GRAND JURY

The grand jury must employ a certified shorthand reporter to make a stenographic record of all testimony and other proceedings before the grand jury. K.S.A. 22-3006(2). No stenographic record of deliberations may be made. K.S.A. 22-3010.

With the approval of the district court, the grand jury may employ investigators or special counsel, and may incur such other expenses for services and supplies as are necessary.

The judge must determine the amount of compensation to be paid to the grand jury employees and the amount of compensation to be paid for service and supply expense incurred. K.S.A. 22-3006.

F. LENGTH OF SERVICE

A grand jury serves until it advises the court in writing that it has completed its investigation or for three months, whichever occurs first. The three month period may be extended by the judge for an additional period not to exceed three months if the order is made before the original period expires, the investigation cannot be completed in the initial three month period, and the public interest requires an extension. K.S.A. 22-3013(1).

IV. THE NUMBER OF GRAND JURORS WHO MUST BE PRESENT BEFORE WORK CAN BEGIN OR CONTINUE

Twelve grand jurors must be present before the grand jury's work can begin or continue. See K.S.A. 22-3001, as amended; 22-3002; 22-3011.

V. THE WORK OF THE GRAND JURY

A. THE DUTY AND ROLE OF THE PROSECUTING ATTORNEY

The prosecuting attorney must attend the sessions of the grand jury to examine witnesses and to give legal advice to the grand jury, if the grand jury requests that the prosecutor do so. K.S.A. 22-3007(1).

The prosecuting attorney must be permitted to appear before the grand jury to give information about matters the grand jury

has authority to investigate, if the prosecuting attorney requests that he or she be able to do so. If the prosecutor is appearing before the grand jury solely as a result of his or her request, the prosecutor may interrogate witnesses only if the grand jury believes it necessary. K.S.A. 22-3007.

B. WITNESSES

1. Process to Compel Attendance

If any person was summoned to appear before the grand jury to testify but failed or refused to do so, compulsory process may be issued to secure the person's attendance. The court may punish the person for disobedience of a subpoena. K.S.A. 22-3008(2), as amended.

2. Right to Counsel (K.S.A. 22-3009)

Any person called to testify before a grand jury must be informed that he or she has a right to be advised by counsel.

If the person requests counsel, no further examination may occur until counsel is present.

Counsel may be retained or, if the person is indigent, appointed.

3. Privilege Against Self-Incrimination; Punishment for Refusal to Answer; Immunity (K.S.A. 22-3008, as amended, and 22-3009)

Any person called to testify before a grand jury must be informed that he or she may not be required to make any

statement that will be self-incriminatory. See K.S.A. 60-424, 60-425.

Counsel may instruct the witness he or she represents to refuse to answer a question because the answer may be self-incriminatory, or privileged. Counsel may not examine or cross-examine any witness including his or her own client.

If the witness refuses to answer a question, this fact must be communicated to a district judge or associate district judge in writing. The statement must include the question the witness refuses to answer. The judge then must decide whether the witness must answer the question and must inform the grand jury of the decision immediately. The judge may not require the witness to incriminate himself or herself. If the judge decides that the witness must answer but the witness refuses to do so, the witness may be punished as if the witness refused to answer a question in open court.

If the judge determines that justice requires it, the judge may grant the witness immunity from prosecution or punishment as to any matter the judge decides the witness must testify. If immunity is granted, the witness must answer the question. Before granting immunity, the judge must consider the possibility that compelling the witness to testify by granting immunity may force the witness to make statements that would subject the witness to prosecution and punishment in another jurisdiction not subject to the grant of immunity.

Prior to granting immunity, notice that the judge is considering a grant of

immunity must be given to the prosecuting attorney. The judge must consider the prosecuting attorney's recommendations before granting immunity.

VI. DISCLOSURE OF MATTERS OCCURRING BEFORE THE GRAND JURY (K.S.A. 22-3012)

All matters occurring before the grand jury, other than the grand jury's deliberations and vote, may be disclosed, without a court order, to the prosecuting attorney for use in the performance of his or her duties.
Jurors, attorneys, interpreters, reporters and typists who transcribe testimony otherwise may not disclose matters occurring before the grand jury, unless directed or permitted to do so by the court.

The court may direct disclosure preliminary to or in connection with a judicial proceeding or permit disclosure upon the defendant's request if the defendant shows that there may be grounds for a motion to dismiss the indictment because of matters occurring before the grand jury.

VII. RETURN OF INDICTMENTS

An indictment may be returned only on the concurrence of 12 or more grand jurors, and must be marked "a true bill" by the foreman. The foreman also must sign the indictment. K.S.A. 22-3011(1).

In the presence of the grand jury, the foreman must present the indictment to the court. The indictment then must be filed and is to remain a record of the court. K.S.A. 22-3011(3).

The court may order that an indictment be kept secret until the defendant is in custody or has given bail. Upon such an order, the clerk of the court must seal the indictment and no person may disclose that an indictment has been returned unless necessary for the issuance and execution of a warrant or summons. K.S.A. 22-3012.

HABEAS CORPUS AND K.S.A. 60-1507

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- F. APPEAL

HABEAS CORPUS AND K.S.A. 60-1507

Although historically a common law remedy, the writ of habeas corpus is now issued pursuant to and governed by statute. See K.S.A. 60-1501 et seq.

I. HABEAS CORPUS

A. DEFINITIONS AND PURPOSE

1. DEFINITIONS

A "petition for a writ of habeas corpus" is a request in the form of a pleading by a person who is detained or confined or whose liberty is restrained in this state, or by a parent, guardian, or next friend of an infant or an incapacitated or incompetent person whose liberty is restrained in this state, that a court issue a writ of habeas corpus and, pursuant to the writ, determine whether the detention, confinement, or restraint of liberty is lawful. K.S.A. 60-1501.

A "writ of habeas corpus" is a written order, bearing the seal of the court, issued by the clerk of the court upon the filing of the petition commanding the person who has under restraint the petitioner or the person for whom the writ is prosecuted, to have the restrained person before the court at the time and place specified. K.S.A. 60-1503.

A "habeas corpus proceeding" is a judicial hearing conducted pursuant to the writ to determine whether the detention or confinement of the restrained person is lawful so that an appropriate judgment may be entered, if the restraint is unlawful, to effect the release of

the restrained person or to transfer the custody of the restrained person to some other person rightfully entitled to custody. K.S.A. 60-1505.

2. PURPOSE

A writ of habeas corpus is prosecuted for the purpose of obtaining immediate relief from unlawful detention, confinement, or restraint of liberty.

B. NATURE OF THE PROCEEDING

Habeas corpus proceedings are summary in character and are civil rather than criminal.

C. PROCEDURES

1. Jurisdiction

The writ of habeas corpus may be prosecuted in the supreme court, court of appeals, or the district court of the county in which the person is being detained or confined, or whose liberty is restrained. K.S.A. 60-1501.

2. The Petition

The petition must be verified and must state the place where the person is restrained and by whom; the cause or basis of the restraint to the best of the petitioner's knowledge and belief; and why the restraint is unlawful. K.S.A. 60-1502. No docket fee may be charged for filing the petition. K.S.A. 60-1501.

3. The Writ

The writ is issued upon the filing of the petition and must be served without delay. See K.S.A. 60-1503(c). The writ may be issued and served at any time, including Sundays and holidays. K.S.A. 60-1503.

4. Warrant in Aid of the Writ

If an affidavit alleges that the restrained person may be taken out of the jurisdiction or suffer irreparable injury before compliance with the writ can be enforced, the court may issue a warrant ordering that the restrained person be brought before the court immediately. The warrant may also order the apprehension of the person causing the restraint. K.S.A. 60-1506. In child custody disputes, the court should exercise caution before ordering the apprehension of the person causing the restraint.

5. The Answer

The person to whom the writ is directed must file an answer within 24 hours from the time the writ is served unless otherwise specified in the writ. K.S.A. 60-1504.

The answer must be verified and must state the authority or the reasons for the restraint; the reasons why the restrained person cannot be produced, if such a claim is made; and, if the custody of the party has been transferred, the time, place, and reason for the transfer and to whom custody was transferred. A copy of the written authority for the restraint must accompany the

answer. K.S.A. 60-1504.

6. The Hearing

The judge must hear and determine summarily whether the restraint is lawful regardless of whether the person restrained is present. Judicial inquiry extends to whether the jurisdiction of the court that ordered the confinement was proper, to the sufficiency of the proceedings and the validity of the judgment that resulted in the restraint, as well as to other pertinent matters.

The judge may make an order for the temporary custody of the restrained person and any other temporary orders during the pendency of the proceeding that justice may require. K.S.A. 60-1505. As of January 1, 1979, child custody determinations are governed by the uniform child custody jurisdiction act, as enacted in Kansas.

When any person is restrained because of an alleged infectious or communicable disease, the judge must appoint a board of not less than two competent physicians to make an examination of such person and to report their findings to the judge. K.S.A. 60-1505(b).

7. The Findings

If the restraint is found to be lawful, the writ is dissolved at the petitioner's cost. K.S.A. 60-1505.

If the restraint is found to be unlawful, the judgment must be that the restrained person be released or that custody be

transferred to some other person rightfully entitled to custody. (As of January 1, 1979, child custody determinations, however, are governed by the uniform child custody jurisdiction act, as enacted in Kansas.) The court may make such other orders as justice and equity or the welfare of a minor physically present in the state may require. K.S.A. 60-1505.

8. Appeal

If the person found to be restrained unlawfully is a minor or other incapacitated person, or is incompetent, the person causing the restraint may request at the time the judgment is rendered that enforcement of the judgment be stayed for up to 48 hours to permit the filing of an appeal. The judge must grant the request and may provide for the temporary custody of the person during the stay. K.S.A. 60-1505.

If the state announces in open court that it will appeal from an order discharging a prisoner, the judge must stay the enforcement of the judgment for up to 24 hours to permit the filing of an appeal. K.S.A. 60-1505.

D. USE OF THE WRIT

1. Child Custody

Although the writ of habeas corpus is available to a person to test the legality of a child's restraint in Kansas by a parent or other person having physical custody of the child, a child custody determination may be made,

as of January 1, 1979, only in accordance with the uniform child custody jurisdiction act, as enacted in Kansas, and regardless of anything in K.S.A. 60-1505(d) appearing to be to the contrary.

2. Patients in Mental Institutions

The remedy is available to test the legality of the mode or conditions of restraint, as well as the restraint itself.

3. Inmates of Correctional Institutions

The remedy is available to test the legality of the mode or conditions of restraint. It is not available to test the legality of the restraint, unless the restraint was imposed pending outcome of an extradition proceeding. See Wilbanks v. State, 224 Kan. 66.

II. K.S.A. 60-1507

A. PRELIMINARY CONSIDERATIONS

Supreme Court Rule 183 applies to K.S.A. 60-1507 proceedings.

The remedy afforded a prisoner by K.S.A. 60-1507 is exclusive. A prisoner in a correctional institution cannot maintain in a state court, either before or after a K.S.A. 60-1507 proceeding, a habeas corpus proceeding to test the legality of his or her restraint.

The remedy afforded by K.S.A. 60-1507 is available only to one in custody claiming the right to be released. The remedy is not available while an appeal from a

conviction and sentence is pending or during the time within which an appeal may be perfected. The remedy cannot be used as a substitute for a direct appeal involving mere trial errors or as a substitute for a second appeal.

A second or successive application for relief under K.S.A. 60-1507 on behalf of the same prisoner need not be considered if the grounds presented in the second or successive application are the same as the grounds presented in the first application, if relief under the first application was denied after a determination on the merits and the ends of justice would not be served by reaching the merits of the second or successive application.

B. THE MOTION TO VACATE, SET ASIDE, OR CORRECT A SENTENCE

1. Substance

The K.S.A. 60-1507 motion is one to vacate, set aside, or correct a sentence on the grounds that the sentence was imposed in violation of the constitution or laws of the United States or of the state of Kansas, or that the sentencing court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum sentence authorized by law or that the sentence otherwise is subject to collateral attack.

2. Form

The motion must be submitted on a form substantially similar to the form appearing in the appendix to S. Ct. Rule 183.

3. Procedure

The motion may be filed pro se. No docket fee is to be charged. The motion is to be docketed as a civil action, separate from the criminal action that resulted in the sentence.

C. INITIAL REVIEW

The court must determine whether the motion, the files, and the records conclusively show that the prisoner is entitled to no relief. If so, the motion must be denied summarily. If not, the court must notify the county or district attorney and hold the hearing as soon as possible.

D. COUNSEL FOR THE PRISONER

If the motion presents substantial questions of law or triable issues of fact the court must appoint counsel for an indigent prisoner.

E. THE HEARING

The court must make findings of fact and conclusions of law regarding the issues presented. The prisoner need not be present unless there are substantial issues of fact as to events in which the prisoner participated. The proceedings must be recorded by the official court reporter.

The prisoner has the burden of establishing grounds for relief by a preponderance of the evidence.

If relief is required the court must vacate the judgment and discharge the

prisoner, resentence the prisoner, correct the sentence, or grant a new trial, as appropriate.

F. APPEAL

An appeal may be taken by either party as an appeal is taken in other civil actions. The court may furnish an indigent prisoner with such portions of the transcript of the proceedings as are necessary for the appeal, and may appoint counsel to conduct the appeal for an indigent prisoner.

INJUNCTIVE RELIEF

I. DEFINITIONS

II. PRELIMINARY CONSIDERATIONS

- A. THE NATURE OF INJUNCTIVE RELIEF
- B. GRANTING INJUNCTIVE RELIEF
- C. A NOTE ON LABOR DISPUTES, TAX LEVIES, AND COMMON NUISANCES

III. INJUNCTIVE RELIEF AS A PROVISIONAL REMEDY

- A. WHEN RESTRAINING ORDER OR TEMPORARY INJUNCTION MAY ISSUE
- B. RESTRAINING ORDERS
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IV. THE ORDER FOR INJUNCTIVE RELIEF

- A. FINDINGS OF FACT
- B. FORM
- C. BINDING EFFECT
- D. VACATING OR MODIFYING THE ORDER

V. PENALTIES FOR DISOBEDIENCE OF A RESTRAINING ORDER OR AN INJUNCTION

VI. RECOVERY ON THE BOND

VII. APPEALS

- A. RIGHT TO APPEAL
- B. PROCEDURE PENDING APPEAL

INJUNCTIVE RELIEF

I. DEFINITIONS

An "injunction" is a court order requiring a defendant to do, or restraining a defendant from doing, a particular act.

A "restraining order" is a court order restraining a defendant from altering the status quo of the subject of controversy until an application for a temporary injunction can be heard and determined. A restraining order is a provisional remedy.

A "temporary injunction" is an injunction that is effective during the pendency of an action and until a final judgment is rendered. A temporary injunction is a provisional remedy.

II. PRELIMINARY CONSIDERATIONS

A. THE NATURE OF INJUNCTIVE RELIEF

Injunctive relief is an equitable remedy that may be afforded as a final judgment in an action or allowed as a provisional remedy. It is to be distinguished from the order of mandamus in that it is a remedy for the enforcement of private rights while the order in mandamus is a remedy compelling a defendant to perform duties of an official character.

B. GRANTING INJUNCTIVE RELIEF

Except where a statute establishes an absolute right to injunctive relief,

granting or refusing to grant injunctive relief is a matter of discretion for the court. Borgen v. Wiglesworth, 189 Kan. 261.

Except where a statute establishes an absolute right to injunctive relief and except as otherwise provided by statute, injunctive relief should not be granted if there is available to the plaintiff a remedy at law adequate to furnish the relief to which the plaintiff is entitled. The other remedy, however, must be as complete, prompt, and efficient a remedy as an injunction would be. Wamberg v. Hart, 114 Kan. 906.

If a statute establishes an absolute right to injunctive relief upon the satisfaction of specified conditions, injunctive relief must be granted without a showing of irreparable injury and the nonexistence of an adequate remedy.

C. A NOTE ON LABOR DISPUTES, TAX LEVIES, AND COMMON NUISANCES

Statutes specifically governing injunctive relief with regard to labor disputes, the illegal levy of any tax, charge, or assessment, and the abatement of common nuisances are located at K.S.A. 60-904, 60-907, and 60-908, respectively.

K.S.A. 60-904(c) should be reviewed carefully before granting injunctive relief in any labor dispute case.

Trespassory picketing in labor - management disputes may be enjoined only where there is shown to be actual violence or a threat of immediate violence

or some obstruction to the free use of property by the public which immediately threatens public health or safety or which denies to an employer or the employer's customers reasonable ingress or egress to and from the employer's place of business. Reece Shirley and Ron's Inc. v. Retail Store Employees Union & Local 782, 222 Kan. 373.

III. INJUNCTIVE RELIEF AS A PROVISIONAL REMEDY (K.S.A. 60-902)

A. WHEN RESTRAINING ORDER OR TEMPORARY INJUNCTION MAY ISSUE

A restraining order or a temporary injunction, as appropriate, may be issued

1. When it appears by a verified pleading or affidavit that a party is entitled to the relief demanded, and such relief includes restraining the commission or continuance of some act which, if not restrained, would produce injury to a party during the litigation; or

2. When during the course of the litigation it appears that a party is doing, is about to do, has threatened to do, or is having someone else do an act which violates the other party's rights with regard to the subject of controversy in the action, or which has a tendency to make ineffectual any judgment rendered.

B. RESTRAINING ORDERS

The issuance of a restraining order should not have the effect of deciding the issues prior to the parties having

had their day in court. A restraining order may not be issued on an unverified application.

Unless the dispute is a labor dispute in which irreparable injury is not likely to occur, a restraining order may issue without notice. If it does, it must be served on each party restrained in the manner prescribed for serving a summons. K.S.A. 60-903. See K.S.A. 60-301 et seq. for the manner of serving a summons.

Unless the dispute is a labor dispute, a restraining order may issue without requiring the plaintiff to furnish bond. The judge may require a bond, however, if it appears to the judge that a restraining order may result in damage to the party restrained. The bond must be in an amount sufficient to secure payment of any damages sustained. K.S.A. 60-903; Tobin Construction Co. v. Holtzman, 207 Kan. 525.

An application for a restraining order also is to be treated as an application for a temporary injunction. K.S.A. 60-903.

A restraining order is effective until there can be a hearing and a determination regarding the application for a temporary injunction. K.S.A. 60-903.

C. TEMPORARY INJUNCTIONS

A temporary injunction may not be issued on an unverified application.

A temporary injunction may not be granted until the party to be enjoined has been

given reasonable notice and an opportunity to be heard. K.S.A. 60-905.

Except as otherwise provided by statute (e.g., K.S.A. 79-3630), a temporary injunction is without legal effect unless the party obtaining the temporary injunction has given an undertaking (bond) with one or more sureties in an amount fixed by the judge and approved by the clerk of the court. The undertaking must be sufficient to pay the damages, including attorneys' fees, sustained by the other party and must be payable upon the determination that the temporary injunction should not have been granted. K.S.A. 60-905. See S. Ct. Rule 114.

IV. THE ORDER FOR INJUNCTIVE RELIEF

A. FINDINGS OF FACT

The judge must set forth the findings of fact when granting or refusing a temporary injunction. This rule does not apply, however, to temporary injunctions granted or refused in divorce actions. K.S.A. 60-252.

B. FORM

Every order granting an injunction and every restraining order must

1. Set forth the reasons for its issuance;

2. Be specific in terms; and

3. Describe in reasonable detail, and not by reference to the petition or

other document, the act or acts sought to be restrained. K.S.A. 60-906.

C. BINDING EFFECT

The order is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in concert or participation with those who receive actual notice of the order by personal service or otherwise. K.S.A. 60-906.

D. VACATING OR MODIFYING THE ORDER (K.S.A. 60-910)

1. Before Final Judgment

A restraining order may be modified or vacated anytime before the hearing and determination of the application for a temporary injunction.

A temporary injunction may be modified or vacated anytime before final judgment.

The application to modify or vacate the order or injunction as well as the adverse party's position with regard to the motion may be submitted by affidavit. Oral testimony may be given and other forms of evidence may be introduced by either side. See K.S.A. 60-206(d) for the manner in which affidavits must be presented and the time in which they must be served.

2. After Final Judgment

Upon an application by any interested party, including a party subsequently

acquiring an interest in the subject matter of the injunction, a judgment granting a permanent injunction may be modified or vacated.

The petition must be verified, filed in the court from which the judgment issued, and state that there has been a change in conditions rendering the injunction unnecessary or partially unnecessary and that the petitioner's interests are being adversely affected. The changed conditions must be stated in reasonable detail.

The procedure pertaining to original civil actions must be followed.

Expenses and reasonable attorneys' fees may be assessed against the petitioner if the petition was not filed in good faith.

Relief also may be available under K.S.A. 60-260(b)(5).

V. PENALTIES FOR DISOBEDIENCE OF A RESTRAINING ORDER OR AN INJUNCTION

In addition to any other appropriate remedies, or damages, disobedience of a restraining order may be punished as contempt of court. K.S.A. 60-909. See the Contempt of Court section in the Miscellaneous chapter.

Contempt proceedings may be initiated by any aggrieved party or his or her successor in interest, or by someone who has a primary interest in the right to be protected. Frey v. Willey, 161 Kan. 196.

The only issue to be decided in the contempt proceeding is whether the restraining order or injunction has been violated. The merits of the original action may not be considered. Roush v. Hodge, 193 Kan. 473.

VI. RECOVERY ON THE BOND

If acquisition of a restraining order or temporary injunction was wrongful, damages may be recovered on the bond, if a bond was furnished. Damages recoverable include compensation for all damages actually sustained and that are the direct, natural, and proximate result of the restraint. Damages for the deprivation of use of property may be measured by the property's rental value. Tobin Construction Co. v. Holtzman, 207 Kan. 525.

Actions for recovery on a bond given for a restraining order or temporary injunction must be brought within five years. K.S.A. 60-511(4).

VII. APPEALS

A. RIGHT TO APPEAL

An order granting a restraining order may be appealed in accordance with K.S.A. 60-2102(b) if the judge believes that the restraining order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The judge must include in the order a statement to this effect. It is

discretionary with the court of appeals whether to accept the appeal.

An order vacating a restraining order is not appealable.

An order that grants, continues, modifies, refuses, or dissolves an injunction is appealable as of right. K.S.A. 60-2102(a).

B. PROCEDURE PENDING APPEAL

If a party is aggrieved by an order modifying or vacating a provisional remedy or injunction, he or she is entitled, upon application to the judge, to have the operation of the order suspended for a period of 10 days on the condition that the party, within that 10 days, file a notice of appeal and obtain and have approved a supersedeas bond. K.S.A. 60-2103(d).

When an appeal is taken from an interlocutory or final judgment granting, refusing, or vacating an injunction the judge, as a matter of discretion, may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as the court considers proper for the security of the rights of the adverse party. K.S.A. 60-262(c).

INQUISITIONS

I. DEFINITION AND PURPOSE; SCOPE; HOW COMMENCED

II. WITNESSES

- A. RIGHT TO COUNSEL
- B. PRIVILEGE AGAINST SELF-INCRIMINATION
- C. IMMUNITY

III. CONTEMPT

IV. USE OF TESTIMONY

INQUISITIONS

I. DEFINITION AND PURPOSE; SCOPE; HOW COMMENCED

An inquisition is an official investigation undertaken to ascertain whether there exists probable cause to believe that a crime has been committed so that a complaint or an information may issue.

Inquisitions may be conducted before a district judge to investigate an alleged violation of any law of the state of Kansas. K.S.A. 22-3101(1), as amended. Inquisitions may be conducted without judicial participation by certain non-judicial officers -- but only with regard to certain alleged violations of law. K.S.A. 22-3101(2), as amended. The latter type of inquisition is not treated in the Benchbook.

The attorney general, an assistant attorney general, or a county or district attorney submits a written application for an inquisition to a district judge for the county in which the alleged violation occurred. The application must set forth the alleged violation and be verified under oath. The applicant must also submit a written praecipe (a list of witnesses who should be commanded to appear to testify or to show cause why certain testimony should not be given) to the district judge. The district judge is then required to issue a subpoena for those witnesses commanding them to appear to testify concerning the matter under investigation. Subpoenas are to be served and returned in the

same way that subpoenas for witnesses in criminal cases in the district court are served and returned.

II. WITNESSES

A. RIGHT TO COUNSEL

Every witness at an inquisition must be informed that he or she has a right to be advised by counsel. K.S.A. 22-3104. If the witness requests counsel, no further examination of the witness may take place until counsel is present. Counsel may be retained or, if the witness is indigent, appointed. See K.S.A. 22-3104(1). The role of counsel is addressed at K.S.A. 22-3104(2).

B. PRIVILEGE AGAINST SELF-INCRIMINATION

Every witness at an inquisition must be informed that he or she cannot be required to make any statement which will be self-incriminatory. K.S.A. 22-3104(1). No witness at an inquisition can be required to make any statement which will incriminate the witness. K.S.A. 22-3102.

C. IMMUNITY

The applicant may grant any witness at an inquisition immunity from prosecution or punishment regarding any matter about which the witness is compelled to testify. If immunity is granted, the testimony cannot be used against the witness in any criminal prosecution under state law or municipal ordinance nor can the witness refuse to answer questions

on the ground that such answers would be self-incriminating, unless such answers would reveal a violation of federal law, or law of another state.

III. CONTEMPT

Any person who disobeys a subpoena, refuses to be sworn as a witness, or refuses to give an answer not privileged may be adjudged in contempt of court and punished as provided by law. K.S.A. 22-3101(3).

IV. USE OF TESTIMONY

The testimony of each witness must be reduced to writing and signed by the witness.

If, from the testimony, the applicant believes that there exists probable cause to believe that a crime has been committed within the county, the applicant may file the testimony with a complaint or information, verified on information and belief, against the person alleged to have committed the crime. Such complaint or information has the same effect as if it had been verified positively, and an arrest warrant can issue as in other criminal cases. See K.S.A. 22-2302.

INTEREST ON JUDGMENTS

I. STATUTE

K.S.A. 16-204, as amended, provides for interest on judgments to be 8% before July 1, 1980, 12% from July 1, 1980 to June 30, 1982, and 15% on and after July 1, 1982.

II. JUDGMENT OR POST-JUDGMENT INTEREST

The general rule set by K.S.A. 16-204, is all judgments bear interest from the date rendered at the statutory rate, unless otherwise agreed by the parties. Judgment or post-judgment interest is due upon the date the judgment is rendered and continues to accrue until paid. Schaefer & Associates v. Schirmer, 3 Kan. App.2d 114, 120, 590 P.2d 1087 (1979). Once the judgment is deposited with the court interest ceases to accrue. Lippert v. Angle, 215 Kan. 626, 630, 527 P.2d 1016, 1020 (1974). To prevent continued accrual of interest while awaiting an appeal the judgment should be deposited with the court. Acceptance of a partial payment does not extinguish the whole debt. Failure to pay the total amount due, principle plus interest to date, results in continued accrual of interest. Helmley v. Ashland Oil, Inc., 1 Kan. App.2d 532, 538, 571 P.2d 345. The partial payment is first applied against the outstanding interest leaving the principle unpaid and still accruing interest. Acceptance of a partial payment does not cut off a claim for the balance of the amount due. Shutts Executor v. Phillips Petroleum Co. 222 Kan. 527, 567 P.2d 1292 (1977). All interest, on judgment and prejudgment, must be simple, interest can not be compounded. Hamilton v. Netherton, 194 Kan. 683, 401 P.2d 657.

III. PREJUDGMENT INTEREST ON LIQUIDATED DAMAGES

Prejudgment interest is allowed if the damages are liquidated. Henderson v. Hass 225 Kan. 678, 689, 594 P.2d 650, (1979). Damages are liquidated "wherever a debtor knows precisely what he is to pay and when he is to pay it, but does not do so." 22 Am. Jur.2d 258, Damages sec. 180.

> Creditors shall be allowed to receive interest at the rate of 10% per annum, when no other rate of interest is agreed upon, for any money after it becomes due; for money lent or money due on settlement of account, from the day of liquidating the account and ascertaining the balance. K.S.A. 16-201.

According to the statute prejudgment interest on liquidated damages begins to accrue at the date of liquidation and continues to accrue until paid.

IV. INTEREST ON MODIFIED JUDGMENTS

Post-judgment interest begins to accrue on the date the judgment is rendered. A subsequent modification and affirmation of th judgment does not change the accrual date. Interest continues to accrue from the date of the original judgment but the principle amount may be adjusted in the later judgment. Lippert v. Angle, 215 Kan. 626, 527 P.2d 1016 (1974) and Equity Investors, Inc. v. Academy Ins. Group, Inc. 229 Kan. 668, 625 P.2d 466 (1981).

V. PREJUDGMENT INTEREST ON UNLIQUIDATED DAMAGES

Under K.S.A. 16-201 prejudgment interest on unliquidated damages is allowed "for money received for the use of another and retained without the owner's knowledge of the receipt;" or "for money due and withheld by an unreasonable and vexatious delay of payment or settlement of accounts." See also, Lightcap v. Mobil Oil Corporation, 221 Kan. 448, 466, 562 P.2d 1 (1977); Seaman U.S.D. No. 345 v. Casson Construction Co, 3 Kan. App.2d 289, 296, 594 P.2d 241 (1975) and Lippert v. Angle 211 Kan. 695, 704, 508 P.2d 920 (1973).

Prejudgment interest begins to accrue at the time of the breach or damage. The charges continue to accrue, as with all other types of interest, until paid. The rate is regulated by statute unless otherwise agreed.

MISTRIAL

I. DEFINITION

II. WHEN PROPER

A. CIVIL ACTIONS

1. Trial to the Court
2. Trial to a Jury

B. CRIMINAL ACTIONS (K.S.A. 22-3423)

III. AVOIDING MISTRIALS

A. CIVIL ACTIONS
B. CRIMINAL ACTIONS

MISTRIAL

I. DEFINITION

A mistrial is the termination of a trial other than on the merits.

II. WHEN PROPER

A. CIVIL ACTIONS

1. Trial to the Court

The court, in its discretion, may declare a mistrial in a civil action being tried to the court, if circumstances exist that would preclude a fair trial for either party. The court may declare a mistrial either on its own motion or on motion of one of the parties.

Some circumstances usually requiring the declaration of a mistrial are:

a. Severe illness or death of the trial judge, a party's attorney, or a material witness.

b. Intimidation of a witness or a party.

c. Failure of one party to obey a discovery order, if the other party first becomes aware of such failure at trial and such failure substantially impairs the opportunity of the other party to receive a fair trial.

d. Surprise which a party reasonably could not have foreseen which substantially impairs the opportunity of

the surprised party to receive a fair trial.

e. Fraud upon the court or upon a party, first manifest at trial, which substantially impairs the opportunity of a party to receive a fair trial.

2. Trial to a Jury

The court, in its discretion, may declare a mistrial in a civil action being tried to a jury if circumstances exist that would preclude a fair trial. The court may declare a mistrial either on its own motion or on motion of one of the parties.

Some circumstances usually requiring the declaration of a mistrial are:

a. Those circumstances listed for civil actions tried to the court, except that in the case of severe illness or death of the trial judge the trial may proceed in accordance with K.S.A. 43-168.

b. Illness or death of a juror. But see K.S.A. 60-248, as amended.

c. Conduct on the part of a juror that substantially impairs the opportunity of a party to receive a fair trial.

d. Conduct on the part of an attorney, a party, or some other person that substantially impairs the opportunity of a party to receive a fair trial.

Examples are an attorney's deliberate comments or repeated innuendo concerning the existence of liability insurance;

undue manifestation of emotion by a party during trial; and a person's attempt to influence a juror.

e. Failure of the jury to agree on a verdict.

B. CRIMINAL ACTIONS (K.S.A. 22-3423)

The court, in its discretion, may declare a mistrial in a criminal action if the court finds that

1. It is physically impossible to proceed with the trial in conformity with law.

2. There is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law and the defendant requests or consents to the mistrial.

3. Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution. (If such conduct is on the part of the state, defendant must promptly object and move for a mistrial. Defendant may not await the outcome of the trial before objecting on these grounds.)

4. The jury is unable to agree on a verdict.

5. False statements given by a juror during voir dire prevent a fair trial.

6. The defendant's competency to stand trial needs to be determined.

After the jury has been sworn or, if trial is to a court without a jury, after trial to the court has commenced, the court should declare a mistrial in a criminal action only with extreme caution on motion of the state without consent of the defendant because of the possibility that further prosecution will be precluded by the prohibition against double jeopardy.

III. AVOIDING MISTRIALS

A. CIVIL ACTIONS

If conduct has occurred in the presence of the jury that could be the basis for a motion for mistrial, the court should admonish the jury to disregard the conduct and this will prevent the necessity for declaring a mistrial as long as the opportunity for a fair trial has not been substantially impaired.

Prior to each recess, jurors should be admonished not to converse with any of the parties, witnesses, attorneys, or other persons on any subject of the trial, and that they should not express any opinion on any matter related to the trial. K.S.A. 60-248(d). The judge should make it clear that the admonition must be followed.

The court should wait a reasonable time before declaring a mistrial on grounds that the jury has failed to reach a verdict. The court should not attempt to coerce a verdict by forcing the jury to continue to deliberate after it is

clear that the jurors cannot agree. Instructions about deadlocked juries should be given with the original instructions. See PIK 10.20 and related comments.

B. CRIMINAL ACTIONS

Unintentional prejudicial conduct on the part of the state may be cured by the court's prompt admonition to the jury that it may not consider the prejudicial question, comment, or other conduct.

Intentional prejudicial conduct by the state is grounds for a mistrial only if such conduct has substantially impaired the opportunity of the defendant to receive a fair trial. The prosecutor, however, should be admonished not to engage in any further intentional prejudicial conduct.

The court should wait a reasonable time before declaring a mistrial on grounds that the jury has failed to reach a verdict. The court should not attempt to coerce a verdict by forcing the jury to continue to deliberate after it is clear that the jurors cannot agree. Instructions in criminal actions about deadlocked juries should be given with the original instructions.

OATHS AND ADMONITIONS

I. OATHS AND AFFIRMATIONS

A. PROSPECTIVE JURORS (PRIOR TO VOIR DIRE)

B. JURORS (PRIOR TO COMMENCEMENT OF TRIAL)

C. INTERPRETERS (PRIOR TO THE WITNESS'S BEING SWORN)

D. WITNESSES (PRIOR TO TESTIFYING)

E. JURY BAILIFF (PRIOR TO THE JURY'S EXIT FROM THE COURTROOM AFTER THE CASE HAS BEEN SUBMITTED TO IT)

II. ADMONITIONS AND EXPLANATIONS

A. EXPLANATION OF CRIMINAL TRIAL PROCEDURE TO THE JURY PANEL

B. ADMONITION TO THE JURY BEFORE COMMENCEMENT OF FINAL ARGUMENTS IN CIVIL ACTION

C. ADMONITION TO THE JURY UPON SEPARATION IN CIVIL ACTION

OATHS AND ADMONITIONS

I. OATHS AND AFFIRMATIONS

A. PROSPECTIVE JURORS (PRIOR TO VOIR DIRE)

1. Oath

Do you and each of you solemnly swear that you will well and truly answer all questions propounded to you, by the court or by counsel, touching upon your qualifications to sit as jurors in this case, so help you God?

2. Affirmation

Do you and each of you solemnly and sincerely affirm and declare that you will well and truly answer all questions propounded to you, by the court or by counsel, touching upon your qualifications to sit as jurors in this case; and that you do this under the pains and penalties of perjury?

B. JURORS (PRIOR TO COMMENCEMENT OF TRIAL)

1. Oath

Do you and each of you solemnly swear that you will conscientiously try all matters submitted to you, and a true verdict give according to the law and the evidence, so help you God?

2. Affirmation

Do you and each of you solemnly and sincerely affirm and declare that you will conscientiously try all matters submitted to you, and a true verdict give according to the law and the evidence; and that you do this under the pains and penalties of perjury?

C. INTERPRETERS (PRIOR TO THE WITNESS'S BEING SWORN)

Do you solemnly swear that you will truly and correctly interpret the questions propounded to the witness by the court or by counsel, and that you will truly and correctly translate the answers given by the witness, so help you God?

D. WITNESSES (PRIOR TO TESTIFYING)

1. Oath

Do you solemnly swear that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

2. Affirmation

Do you solemnly and sincerely affirm and declare that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth; and that you do this under the pains and penalties of perjury?

E. OATH OF BAILIFF (S. Ct. Rule No. 171)

Persons ordered by the court to be in charg of a jury during the jury's deliberations shall be required by the court to subscribe to an oath which shall be filed with the Clerk of the Court. Once filed with the Clerk of the Court, the oath shall continue in effect until it is set aside by a judge of the district court. Such person may continue to act as bailiff in jury cases thereafter without being required to file a new oath.

The form of the oath shall be as follows:

I, the undersigned, a duly appointed, qualified, and acting officer of the District Court of _____ County, Kansas, do solemnly swear to faithfully perform the duties of bailiff as assigned and in the manner prescribed by the court.

Further, when acting in the capacity of bailiff and a jury is entrusted to me by a judge of the court, I will keep the jury together only in places designated by the court until they agree upon a verdict or are discharged by the court, subject to an order of the court permitting them to separate temporarily at night and at their meals.

I do solemnly swear that I shall not allow any communications to be made to the jury or make any myself unless by order of the court and, before their verdict is rendered, I shall not communicate to any person the state of their deliberations or the verdict agreed upon.

So help me God.

Subscribed and sworn before me this _____ day of _____, 19___.

Clerk of the District Court

By _____
Deputy Clerk

II. ADMONITIONS AND EXPLANATIONS

A. EXPLANATION OF CRIMINAL TRIAL PROCEDURE TO THE JURY PANEL (SAMPLE)

Ladies and gentlemen, you constitute what is known as a jury panel. From this panel, the parties to this case will select the jurors who will hear the case and render a verdict on the issues. They will ask you questions to determine if there is any legal reason why any of you should not hear this particular case. If legal cause is shown by your answers, you will be excused. After both sides have accepted a given number of jurors, they will then have the right to excuse a number of jurors without cause, or peremptorily, because the parties to every lawsuit have the right to select their own jury. After all excuses for cause, and all peremptory challenges have been exercised, or waived, the remaining persons will become the jury that hears this case.

The next step in the trial will be the opening statements, which will be explained more thoroughly when we reach that stage. After that we will hear the state's witnesses testify, and they will be cross-examined by defense counsel. When the state rests, the defendant may call witnesses to testify, and they will be cross-examined by the prosecutor. When the defense rests, the state may call some rebuttal witnesses to testify and, if so, the defense may call surrebuttal

witnesses. When both sides have rested their cases completely, the court will prepare written instructions on the law governing this case, read them to you, and allow both sides to make final argument. When the arguments end, you will retire, with the instructions on the law and the physical exhibits, and deliberate on your verdict. The court will keep you informed as we move from stage to stage during the trial.

B. ADMONITION TO THE JURY BEFORE COMMENCEMENT OF FINAL ARGUMENTS IN CIVIL ACTION (SAMPLE)

Members of the jury, you are admonished tha counsel in their final argument may comment upon and refer to the evidence and instructions, and urge upon you their theory of this case. It is in fact their duty to do so since they are advocates of their client cause.

You are reminded, however, that the evidenc is complete, and that counsel may not add t it by argument. Nor may they add to the la as given to you in the instructions.

You will disregard any statement, if any should be made, that is outside the evidenc or contrary to the evidence. You will also disregard any statement concerning the law that was not contained in the instructions.

C. ADMONITION TO THE JURY UPON SEPARATION IN A CIVIL ACTION (SAMPLE)

Members of the jury, you are admonished that, pursuant to law and in keeping with your oath, you may not discuss this case or any part thereof with any person, including your spouse or members of your family, or even with another juror. You shall not permit any person to converse with you about this case, and shall report to this court any attempt to do so. You shall not read or listen to any accounts or conversations of others concerning this case. You shall make no inquiry, or investigation of your own, shall not visit any scene to make visual observations, nor do anything to enlarge upon the evidence offered by the parties in open court. You are also admonished to keep an open mind until the case has been submitted to you.

SEARCH WARRANTS

SEARCH WARRANTS

I. DEFINITIONS

A search warrant is a document issued by a magistrate which orders all state law enforcement officers or a specifically named law enforcement officer to search a particularly described person, place, or means of conveyance to seize a particularly described object or person.

In addition to being judges, district judges, associate district judges, and district magistrate judges are magistrates. K.S.A. 22-2202, as amended.

II. PROCEDURE FOR ISSUING A SEARCH WARRANT

An application or a request for a search warrant must be submitted to a magistrate and must be accompanied by a statement alleging that a certain crime was or is being committed and that a particularly described object or person can be seized by searching a particularly described person, place, or means of conveyance. K.S.A. 22-2502, as amended.

Before ruling on the application, the magistrate may require the person who made the statement to appear personally and, upon such person's personal appearance, may examine him or her as well as any witnesses such person produces. Any such examination must be taken down by a certified shorthand reporter, or be recorded on recording equipment, and made a part of the application. K.S.A. 22-2502, as amended.

If the magistrate has probable cause to believe that the crime was or is being committed and that the particularly described person, place, or means of conveyance is the location of the object to be seized or person to be searched, a search warrant may issue. A magistrate has such probable cause only if the application and supporting evidence contains facts sufficient to allow a prudent man to conclude, intelligently and independently, that the crime was or is being committed and that the item to be seized is located where the statement alleges it to be. K.S.A. 22-2502, as amended. State v. Hart, 200 Kan. 153.

Items which may be seized are:

A. Things used in the commission of a crime;

B. Contraband;

C. Property which constitutes or may be considered a part of the evidence, fruits, or instrumentalities of a crime. ("Fruits" includes any property into which property unlawfully taken or possessed was converted.);

D. Any person kidnapped in violation of the laws of this state or in another jurisdiction, and who is now concealed in Kansas;

E. Any human fetus:

F. Any human corpse. K.S.A. 22-2502, as amended.

The statement accompanying the application may be based on hearsay and, if it is, must contain enough affirmative allegations of facts within the personal knowledge of the affiant, or informant, or concerning the affiant's personal knowledge about the reliability of the informant so that there is a reasonable basis for determining whether or not probable cause exists. An informant need not be identified as long as there is a substantial basis for concluding that the hearsay information is reliable. State v. Hart, 200 Kan. 153.

The statement accompanying the application must have been made under oath or after the person affirmed the truth and accuracy of the statement. If the statement is made orally, it must be taken down by a certified shorthand reporter, or recorded on recording equipment in the magistrate's presence. An oral statement must be reduced to writing as soon as possible. K.S.A. 22-2502, as amended.

The statement and the application need not be filed with the clerk of the court until after the search warrant is executed or returned unexecuted. K.S.A. 22-2504.

III. FORM

The warrant must order the person addressed to search the person, place, or means of conveyance and to seize from such person, or at such place or means of conveyance, the things described in the warrant. The warrant must particularly

describe the person, place, or means of conveyance and the things to be seized. K.S.A. 22-2507.

The warrant is to be issued in the name of the magistrate, as magistrate rather than as judge. The warrant need not bear the seal of the court or clerk of the court. K.S.A. 22-2504.

The warrant is to be issued in duplicate and must show the date and time of issuance. K.S.A. 22-2504 and 22-2505.

NOTE: Technical irregularities in a search warrant that do not affect substantially the rights of an accused are not grounds for quashing a search warrant or suppressing seized evidence. An insufficient description of the place to be searched, the description of multiple premises, the naming of a John Doe without physical description, and the alteration of the warrant by someone other than the issuing magistrate are, however, irregularities in form that will result in the quashing of the warrant or in the suppressing of the seized evidence. K.S.A. 22-2511.

IV. EXECUTION

A. WHO MAY EXECUTE A SEARCH WARRANT

Only a law enforcement officer may execute a search warrant. A law enforcement officer is a person who by virtue of office or public employment is vested by law with a duty to maintain public order or to make arrests for violation of the laws of Kansas or the ordinances of any Kansas municipality. K.S.A. 22-2505 and 22-2202, as amended.

B. WHERE SEARCH WARRANT MAY BE EXECUTED

If issued by a magistrate who is also a district judge or associate district judge, a search warrant may be executed anywhere in Kansas. State v. Lamb, 209 Kan. 453, 469.

If issued by a magistrate who is also a district magistrate judge, a search warrant may be executed only within the judicial district in which the magistrate resides, or has been assigned. K.S.A. 22-2503, as amended.

C. WHEN SEARCH WARRANT MAY BE EXECUTED

A search warrant must be executed within 96 hours from the time it is issued and may be executed at any time of the day or night. If not executed within this time the warrant is void and must be returned to the magistrate after it is marked "not executed." K.S.A. 22-2506.

D. HOW SEARCH WARRANT MAY BE EXECUTED

All necessary and reasonable force may be used to enter any building or property to execute the search warrant. K.S.A. 22-2508.

The duplicate copy of the warrant is to b left with the person from whom the property was seized. If no person is present at the time of the search and seizure, the duplicate copy must be left at the place where the search and seizure occurred. K.S.A. 22-2506.

A receipt, particularly describing each article of property seized, must be given to the person from whom the property was

seized if the person is arrested or detained, a copy of the receipt must be filed with the magistrate before whom such person will be taken. K.S.A. 22-2512.

V. CUSTODY OF SEIZED PROPERTY

The property seized is to be kept safely by the officer who seized it for as long as is necessary to insure its availability as evidence. K.S.A. 22-2512.

VI. DISPOSITION OF SEIZED PROPERTY

If the property is no longer needed as evidence by the court which has jurisdiction over it, the court may transfer the property to other courts of this or another state or of the federal government if the court is satisfied that such property is needed as evidence in a criminal prosecution in such other court. K.S.A. 22-2512, as amended.

If the property is no longer needed as evidence it is to be disposed of as follows:

A. Noncontraband must be returned to its rightful owner except for money that was contained in slot machines or used in unlawful gambling or lotteries. Such monies are to be disposed of in accordance with the statute.

B. Contraband must be destroyed except that the court may order sold any contraband capable of innocent use. Proceeds from the sale are to be disposed of in accordance with the statute.

C. Firearms and like devices used in the commission of a crime are to be destroyed, sold, or returned to their owners. Proceeds from any such sale are to be disposed of in accordance with the statute.

D. Property unclaimed or the ownership of which is unknown must be sold at a sheriff's public auction and the net proceeds of the sale are to be disposed of in accordance with the statute.

E. Disposition of all other property is a matter of judicial discretion unless otherwise provided by law. K.S.A. 22-2512.

SMALL CLAIMS

I. APPLICABLE CODE

II. JURISDICTIONAL LIMITATIONS

- A. SUBJECT MATTER
  - 1. Plaintiff's Claims
  - 2. Defendant's Claims
- B. PARTIES
- C. NUMBER OF CLAIMS

III. VENUE

IV. PLEADINGS

V. PROCEDURE

- A. HOW AND WHEN COMMENCED
- B. ATTORNEYS
- C. DISCOVERY AND DEPOSITIONS
- D. ATTACHMENT AND GARNISHMENT
- E. TRIAL
- F. COSTS

VI. APPEALS

- A. HOW TAKEN
- B. TRIAL DE NOVO (DISTRICT COURT)
- C. ATTORNEY AND ATTORNEYS' FEES
- D. FURTHER APPEAL (APPELLATE COURTS)

SMALL CLAIMS

I. APPLICABLE CODE (Small Claims Procedure Act: K.S.A. 61-2701 et seq., as amended)

The small claims procedure is part of and supplemental to Chapter 61 as an alternative procedure. Unless otherwis specifically provided by statute, the provisions of Chapter 61 are applicable K.S.A. 61-2702.

II. JURISDICTIONAL LIMITATIONS

A. SUBJECT MATTER

Limited to actions to recover money or personal property in amounts or value not exceeding $500. No small claims actior may be commenced on a claim obtained by assignment or through subrogation. A clair may be based on an obligation to a person other than the one filing the claim only where the person filing is a full-time salaried employee of the real party in interest. K.S.A. 61-2703.

1. Plaintiff's Claims

Plaintiff's claim is limited as described above. If a plaintiff seeks judgment in excess of the small claims jurisdiction the court must (1) dismiss the case at plaintiff's cost, but without prejudice, (2) allow plaintiff to amend to come within the scope of the small claims jurisdiction thereby waiving the right to recover any excess, and require plaintiff to pay accrued costs, or (3)

allow plaintiff to amend so as to commence an action under K.S.A. 61-1703, and assess costs accrued to plaintiff. K.S.A. 61-2706.

2. Defendant's Claims

A defendant may make a claim only if it arises out of the transaction or occurrence that is the subject matter of plaintiff's claim. If a defendant asserts a claim, in excess of the court's small claims jurisdiction, that does arise out of the same transaction or occurrence, and is within the court's general jurisdiction, the court may determine the entirety of defendant's claim. This is the only exception to the $500 limitation.

If the court refuses to determine the entirety of a claim by a defendant in excess of the jurisdictional amount the court must allow defendant to (1) make no claim and reserve the right to pursue it in a court of competent jurisdiction, (2) demand judgment for not more than $500 in the small claims action, and reserve the right to pursue the excess in a court of competent jurisdiction, or (3) demand judgment for not more than $500 and waive the excess. K.S.A. 61-2705, 61-2706.

B. PARTIES

Any individual, partnership, corporation, joint venture, society, organization, or association may be a party to a small claims action. K.S.A. 61-2703.

C. NUMBER OF CLAIMS

No person may file more than five small claims actions in the same court during a calendar year. Any judgment entered in violation of this limitation is void and unenforceable. K.S.A. 61-2704, 61-2707.

III. VENUE

Venue is the same as prescribed in Article 19 of Chapter 61, except that unless some other basis for venue is present, the county in which the cause of action arose is not proper venue for an action against a resident of Kansas. K.S.A. 61-2708. See K.S.A. 61-1901 et seq.

IV. PLEADINGS

The only pleadings allowed are a petition and defendant's claim. The court must supply forms to the parties which must be in substantial conformity to the forms provided in K.S.A. 61-2713. K.S.A. 61-270

V. PROCEDURE

A. HOW AND WHEN COMMENCED

An action is commenced by filing a written claim, on the form supplied by the court, with the clerk of the court. There is a docket fee which the judge may waive for good cause. Payment of the docket fee should not be regarded as a prerequisite to jurisdiction.

An action is deemed commenced as of the time a person files a claim if, within 90 days after the date of filing, service of process is obtained or first publication (when service of process is to be by publication) is made. Otherwise, the action is deemed commenced as of the time of service of process or first publication. K.S.A. 61-2704. Commencement of an action tolls the running of the statute of limitations.

B. ATTORNEYS

No party may be represented by an attorney prior to judgment. K.S.A. 61-2707.

C. DISCOVERY AND DEPOSITIONS

No discovery methods or proceedings shall be allowed, and no depositions may be taken for any purpose. K.S.A. 61-2707.

D. ATTACHMENT AND GARNISHMENT

No order of attachment or garnishment shall be issued prior to judgment. K.S.A. 60-2707.

E. TRIAL

The trial may be only to the court. To provide a speedy trial, the court may make orders consistent with the act as are necessary to promote justice and fairly protect the parties. This would include modification of strict rules of evidence. K.S.A. 61-2712.

F. COSTS

Costs may be assessed as in other actions under Chapter 61. K.S.A. 61-2710. See K.S.A. 61-2501 et seq.

VI. APPEALS

A. HOW TAKEN

An appeal may be taken from any order, ruling, decision or judgment under the small claims procedure act by filing a notice of appeal specifying the appellant and the ruling or judgment appealed from with the clerk of the court within 10 days after entry of judgment. Notice of appeal must be served on all parties in accordance with K.S.A. 60-205. All proceedings to enforce a judgment are stayed during the appeal time and during the pendency of any appeal. No supersedeas bond is required. K.S.A. 61-2709, as amended.

B. TRIAL DE NOVO (DISTRICT COURT)

All appeals are determined by trial de novo before a district judge or associate district judge other than the one from which the appeal was taken.

NOTE: The provisions of K.S.A. 61-1716, as amended, are applicable to such appeals and this includes the right to a jury tria

C. ATTORNEY AND ATTORNEYS' FEES

Any party to an appeal may be represented by an attorney. If the appellee prevails on an appeal, the court shall award appell as part of the costs, reasonable attorneys

fees incurred by the appellee on the appeal. K.S.A. 61-2709, as amended.

D. FURTHER APPEAL (APPELLATE COURTS)

Any order, ruling, decision or judgment rendered by a district judge or associate district judge on an appeal may be appealed to the appellate courts in the manner provided by Article 21 of Chapter 60 of the Kansas Statutes Annotated. K.S.A. 61-2709, as amended.

UNIFORM CHILD CUSTODY JURISDICTION ACT
(K.S.A. 38-1301, et seq.)

I. PRELIMINARY CONSIDERATIONS

- A. PURPOSE
- B. DEFINITIONS
- C. PLEADINGS
- D. CALENDAR PRIORITY

II. JURISDICTIONAL TESTS

- A. HOME STATE
- B. SIGNIFICANT CONNECTIONS
- C. EMERGENCY
- D. OTHER

III. GROUNDS FOR DECLINING OR PRECLUDING JURISDICTION

- A. SIMULTANEOUS PROCEEDINGS IN OTHER STATES
- B. INCONVENIENT FORUM
- C. CONDUCT
- D. CONTINUING JURISDICTION UNTIL ASSUMED BY OTHER STATE

IV. NOTICE AND OPPORTUNITY TO BE HEARD

- A. GENERAL RULE
- B. NOTICE TO PERSONS OUTSIDE THIS STATE
- C. ADDITIONAL PARTIES
- D. APPEARANCE OF PARTIES AND CHILD

V. EFFECT OF CUSTODY DECREE

VI. MODIFICATION OF OUT-OF-STATE DECREES

VII. REGISTRY OF OUT-OF-STATE DECREES

VIII. INTERSTATE TRANSMISSION OF INFORMATION

I. PRELIMINARY CONSIDERATIONS

A. PURPOSE

The purpose of this act is to avoid jurisdictional conflicts by establishing a set of rules to determine the one court that should exercise custody jurisdiction from the standpoint of the best interests of the child.

B. DEFINITIONS

"Custody determination" means a court decision and court orders providing for care of a child, including visitation rights; it does not include a child support or other monetary decision of any person.

"Home state" means the state in which the child lived for at least six consecutive months at the time of the commencement of the proceeding including periods of temporary absence.

C. PLEADINGS

Each party's first pleading or attached affidavit must contain the information required by the act.

A party has a continuing duty to give the court notice of any other custody proceedings elsewhere during this proceeding, and such additional information under oath as required by the court.

D. CALENDAR PRIORITY

Upon request of a party, the case shall be given calendar priority and handled expeditiously.

II. JURISDICTIONAL TESTS

A. HOME STATE

If this state is the home state of the child at the commencement of the proceeding (or was within the preceding six months during which time the child was removed by a claimant and a parent continues to live in the state), this court has jurisdiction.

B. SIGNIFICANT CONNECTIONS

This test is met if it is in the best interests of the child to assume jurisdiction, the child and at least one contestant have a significant connection with this state, and there is substantial evidence of the child's future care, protection, training and personal relationships in this state. This test requires maximum contact with this state and is meant to limit, not expand jurisdiction. See Larsen v. Larsen, 5 Kan. App. 2d 284 (jurisdiction found under this section when children were born here, the original decree was granted here, and the mother continued to live here with visitation rights with children in the summer) and Bills v. Murdock, 232 Kan. 237, 242 (jurisdiction not found under this section: "for a child to have significant connection with this state, something beyond the residency of a parent in Kansas, the visiting of the child with that parent, and the presence of the child in Kansas when a petition for change of custody is filed, must be shown.")

C. CHILD ABANDONED OR EMERGENCY

The court also has jurisdiction if the child is physically present in the state and (1) the child has been abandond, or (2) the child has been mistreated, threatened, or is dependent and neglected.

D. NO OTHER STATES HAVING JURISDICTION

A court of this state may assume jurisdiction if no other state has jurisdiciton under this statute. Jurisdiction may also be assumed if another state declines to exercise it in favor of this state and it is in the best interests of the child.

E. CAVEAT

Except as expressly provided by this act, the mere physical presence in this state of the child or the child and a contestant is not sufficient to confer jurisdiction on a court in this state.

III. GROUNDS FOR DECLINING OR PRECLUDING JURISDICTION

A. SIMULTANEOUS PROCEEDINGS IN OTHER STATES

A court of this state shall not exercise jurisdiction if a custody proceeding concerning a child is pending in a state exercising jurisdiction substantially in conformity with this act, unless stayed because this state is a more appropriate forum. The court shall examine the pleadings,

affidavits and child custody registry concerning pending actions in other states and shall take appropriate action if informed of another pending proceeding.

B. INCONVENIENT FORUM

A court may decline jurisdiction if it finds it is an inconvenient forum and that the court of another state is a more appropriate forum considering the factors listed in this statute. If the court finds that it is an inappropriate forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that custody proceedings be promptly commenced in another state. A court may retain jurisdiction over a divorce or other proceeding even if it declines jurisdiction under this act. If it appears to the court that it is a clearly inappropriate forum, it may require the petitioner to pay costs, necessary travel and other expenses, including attorneys' fees incurred by the other parties or their witnesses. Upon dismissal or stay this court shall inform the court found to be a more appropriate forum of this fact. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

C. CONDUCT

If the clean hands doctrine is not met, that is, where a party has abducted a child, violated a custody order or engaged in similar reprehensible conduct, the court may refuse to

exercise jurisdiction. Necessary travel and other expenses, including attorneys' fees, may be charged against the petitioner.

D. CONTINUING JURISDICTION UNTIL ASSUMED BY OTHER STATE

Jurisdiction in the court continues, even if declined, until a court of another state assumes custody jurisdiction of the child.

IV. NOTICE AND OPPORTUNITY TO BE HEARD

A. GENERAL RULE

Reasonable notice and opportunity to be heard shall be given to the contestants before making the decree.

B. NOTICE TO PERSONS OUTSIDE THIS STATE

Persons outside of this state shall be given notice in a manner reasonably calculated to give actual notice and may be by personal delivery, in any manner sufficient under the other state's laws, by receipt mail, or as directed by the court (including publication, if other methods are ineffective). Notice is not required if a person submits to the court's jurisdiction. Notice shall be given at least 30 days before the hearing.

C. ADDITIONAL PARTIES

Additional persons not party to the proceedings who have physical custody of the child or claim custody or

visitation rights shall be ordered to be joined as a party and given notice of the proceeding.

D. APPEARANCE OF PARTIES AND CHILD

The court may order any party in this state to appear with the child. If the party is in another state, the court may order that notice be sent to such party that failure to appear may result in a decision adverse to that party. The court may also order the petitioner to pay for the out-of-state party's traveling and other necessary expenses, if just and proper under the circumstances.

V. EFFECT OF CUSTODY DECREE

A custody decree rendered by a court of this state is binding on all parties served, notified and given the opportunity to be heard if the court has exercised jurisdiction under the act.

An original or modified out-of-state custody decree is mandatorily recognized and enforced in this state if the other state has substantially adopted this or a similar act and acted thereunder.

VI. MODIFICATION OF OUT-OF-STATE DECREES

A court of this state shall not modify another state's decree unless that state no longer has jurisdiction and this court has jurisdiction. The court may then consider the other state's prior transcript of record and other documents.

VII. REGISTRY OF OUT-OF-STATE CUSTODY DECREES

The clerk of each district court shall maintain a registry of certified copies of other state's custody decrees and documents that may affect this court's jurisdiction. Certified copies of this court's decrees shall be sent to other courts or affected parties upon their request.

VIII. INTERSTATE TRANSMISSION OF INFORMATION

The filing of a certified copy of an out-of-state custody decree with the clerk of the district court in this state gives it the full force and effect of a decree by a court of this state.

This court may direct the taking of testimony of witnesses, including the parties and the child, by deposition and otherwise, in another state.

This court may request the court of another state to hold hearings and make social studies and to forward to this court such social studies and certified copies of transcripts. The costs shall be paid by the county or assessed against the parties. A court of this state may also request the court of another state to order a child and party to appear in the proceedings, with expenses assessed against the petitioner or otherwise paid. This state may give similar assistance to other state courts upon request.

Custody documents shall be preserved until the child is 18 and forwarded upon request to courts of other states. A court of this state may make similar requests of courts of other states.

Cases Cited - By Name

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Cases Cited - Chronological Order

DIVORCE